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Supreme Court, U.S.
FILED

No. 07- 07-297 AUG 30 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HAROLD E. HILL, MARGARET R. AND WILLIAM F. McCRIGHT, JOHN J. McQUEEN, RITA J. MOSKOWITZ, AND BARBARA SANTEE,

Petitioners,

v.

THOMAS E. KEMP (CHAIRMAN, OKLAHOMA TAX COMMISSION), JERRY JOHNSON (VICE CHAIRMAN, OKLAHOMA TAX COMMISSION), CONNIE IRBY (SECRETARY-MEMBER, OKLAHOMA TAX COMMISSION), AND BRAD HENRY (GOVERNOR),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The overarching question presented by this petition is whether the Tax Injunction Act, 28 U.S.C. § 1341, divests federal courts of original jurisdiction over a challenge to a statutory scheme authorizing the sale by the state of special license plates to those motorists who choose to purchase them, where the scheme impermissibly discriminates against the expression of certain views on such plates.

Underlying this central question are two subsidiary questions of equal importance:

(1) Whether, for purposes of the Tax Injunction Act, the amount charged by the state and paid by those motorists who choose to purchase a special license plate is not a tax, as the lower courts held, but instead an alternative source of state revenue, such as a contractual debt between a buyer and a seller.

(2) Whether the Tax Injunction Act is not, as the lower courts held, a jurisdictional bar to petitioners' viewpoint discrimination claims where *(a)* petitioners do not challenge either the calculation of any motorist's tax liability or the validity of the amount charged for any particular special license plate, *(b)* petitioners wish to purchase a special license plate expressing their own views, and *(c)* petitioners' claims would exist even if special license plates were available to motorists free of charge.

PARTIES TO THE PROCEEDING

Petitioners are Harold E. Hill, Margaret R. and William F. McCright, John J. McQueen, Rita J. Moskowitz, and Barbara Santee, all plaintiffs-appellants in the proceedings below.

Respondents are Thomas E. Kemp, Jerry Johnson, Connie Irby (respectively, the Chairman, Vice-Chairman and Secretary-Member of the Oklahoma Tax Commission), and Brad Henry (Governor of the State of Oklahoma), all defendants-appellees in the proceedings below sued in their official capacities.

Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC"), a plaintiff-appellant in the proceedings below), does not seek further review of any of the decisions issued below with respect to its claims, which are distinct and severable from petitioners' claims. ORC's claims, unlike petitioners' claims, were also asserted against Howard H. Hendrick (Director of the Oklahoma Department of Human Services), W.A. "Drew" Edmondson (Oklahoma Attorney General), and Scott Meacham (Oklahoma Treasurer). These three individuals, who were each sued in their official capacities by ORC, are also not petitioners before this Court.[1]

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No petitioner is a corporation.

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[1] The district court substituted Defendant Meacham for Robert Butkin pursuant to Fed. R. Civ. P. 25(d)(1).

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OPINIONS BELOW

The opinion of the court of appeals is reported at 478 F.3d 1236 (10th Cir. 2007) and reproduced as Appendix A (1a-53a). The unpublished opinion and order of the district court, No. 04-CV-0028 (N.D. Okl. Aug. 16, 2005), is reproduced as Appendix B (54a-71a).

JURISDICTION

The court of appeals entered judgment on March 6, 2007, and a timely-filed petition for rehearing and rehearing en banc was denied on April 2, 2007. App. C, 72a-73a. On June 14, 2007, Justice Breyer extended the time within which to file a petition for *certiorari* to and including August 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." App. D, 74a.

The challenged statutory scheme, 47 Okla. Stat. §§ 1135.1 through 1135.8, is reproduced as Appendix E (75a-140a.[2] Other relevant provisions referenced in the statutory scheme are reproduced as Appendix F (141a-168a).

STATEMENT OF THE CASE

Petitioners challenge a statutory scheme authorizing the sale of special license plates by the Oklahoma Tax Commission to those Oklahoma motorists who choose to purchase them. Through the scheme, the Oklahoma legislature created actual

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[2] Petitioners do not include 47 Okla Stat. §§ 1135.1(B)(3) (App. E, 79a-80a), (B)(5) (*id.*, 80a-81a), and 1135.4 (*id.*, 113a-115a) in their challenge to the statutory scheme.

and potential viewpoint discrimination in a state-created private speech forum by impermissibly favoring the expression of certain views on special license plates.

The discrimination first manifested itself by the wholesale exclusion from the forum of any view not expressly authorized by the state. A statutory amendment enacted after petitioners commenced this lawsuit ostensibly opened the forum to the expression of all views – but only by subjecting certain views (*i.e.*, those not shared by the state) to more stringent and unreasonable access restrictions than those views shared by the state.

To remedy the resulting constitutional infirmities, petitioners seek a declaration that the scheme is unconstitutional and to enjoin its further enforcement. Petitioners alternatively seek to enjoin the specific provisions of the scheme authorizing the expression of a particular view – one that petitioners do not share – about women's reproductive options. This injunctive relief is necessary to level the playing field and place all viewpoints on equal footing in the forum pending the enactment of a constitutional scheme.

The district court dismissed petitioners' claims for lack of jurisdiction under the Tax Injunction Act, and the court of appeals affirmed. Both decisions resulted from erroneous understandings as to the nature of the payments made for special license plates and the scope of the Tax Injunction Act's jurisdictional bar. The consequence was to deny petitioners the judicial review by the lower courts to which they are entitled for violations of rights secured by the First and Fourteenth Amendments to the United States Constitution.

A. The Viewpoint Discriminatory State Law Underlying Petitioners' Federal Claims

All Oklahoma motorists must register their vehicles with the Oklahoma Tax Commission (the "OTC") before taking to

the roads. *See* 47 Okla. Stat. § 1113. As part of this process, motorists are required to pay "registration fees" ranging from $21 to $87 to the OTC. *See* §§ 1132; 1132.1; 1132.4; 1132.5. The OTC, in exchange, assigns unique identifying information to each motorist's vehicle and issues to each motorist a standard license plate displaying that information. *See* § 1113. A standard license plate can be revoked, cancelled, and repossessed at any time and thus is the property of the state. *See* § 1106. Motorists may not alter the content of a standard plate. § 1151(A)(3). Motorists are subject to criminal penalties for failure to affix their state-issued unaltered standard license plates to their vehicles' rear bumpers. §§ 1113(A)(2); 1151(A).

Oklahoma nevertheless permits its motorists to purchase from the OTC "special" license plates to be affixed to their vehicles in lieu of standard license plates. Special license plates substantially differ in appearance from standard license plates. The most obvious and significant difference is that special license plates display – in addition to the unique identifying information displayed on standard license plates – words, numbers, colors, designs and illustrations constituting self-expression. The self-expression displayed on special license plates neither facilitates the identification of motor vehicles nor assists the state and its employees and agents in performing safety, traffic and law enforcement functions.

Those Oklahoma motorists who choose to purchase a special license plate are required to pay a price of $8, $15 or $35 above the "registration fees" necessary to obtain a standard license plate.[3] At least $8 of the purchase price must be deposited into the Oklahoma Tax Commission Reimbursement Fund "to be used for the administration of the [Oklahoma Vehicle License

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[3] §§ 1135.1(B)(1) (App. E, 76a); 1135.1(B)(2)(f) (*id.*, 79a); 1135.1(B)(4) (*id.*, 80a); 1135.1(B)(6) (*id.*, 81a); 1135.1(B)(7) (*id.*, 81a); 1135.2(C) (*id.*, 101a); 1135.3(C) (*id.*, 113a); 1135.5(C) (*id.*, 134a); 1135.6 (*id.*, 135a-136a); 1135.7(C) (*id.*, 137a); 1135.7(D) (*id.*, 137a-138a).

and Registration Act, 47 Okla. Stat. §§ 1101 *et seq.*]."[4] Any remainder is typically: *(a)* given directly to various private entities that support the view displayed on the plate;[5] *(b)* deposited into specified state funds for subsequent distribution directly to private entities for purposes relating to the view displayed on the plate;[6] *(c)* deposited into specified state funds for subsequent distribution directly to government entities for purposes relating to the view displayed on the plate;[7] and/or *(d)* apportioned among Oklahoma municipalities, school districts, and various state funds.[8]

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[4] §§ 1135.1(D) (App. E, 82a); 1135.2(C) (*id.*, 101a); 1135.3(C) (*id.*, 113a); 1135.5(C)(2) (*id.*, 135a); 1135.6 (*id.*, 135a-136a); 1135.7(C) (*id.*, 137a); 1135.7(D) (*id.*, 137a-138a).

[5] *See, e.g.*, 47 Okla. Stat. §§ 1104.1(A)(1) (remainder paid directly to private or public colleges and universities) (App. F, 151a); 1135.5(B)(19) (remainder paid directly to Boy Scouts of America) (App. E, 126a); 1135.5(B)(25) (remainder paid directly to Lions Service Foundation) (*id.*, 128a).

[6] *See, e.g.*, 47 Okla. Stat. §§ 1104.5 (remainder deposited into Urban Forestry and Beautification Revolving Fund for distribution to non-profit organizations that develop and operate programs to encourage urban forestry and beautification) (App. F, 156a); 1104.10 (remainder deposited into Animal Friendly Revolving Fund for distribution to private veterinary clinics and non-profit animal shelters for spaying, neutering and shelter programs) (*id.*, 163a).

[7] *See, e.g.*, 47 Okla. Stat. §§ 1104.8 (remainder deposited into Color Oklahoma Revolving Fund to be expended by Department of Tourism and Recreation pursuant to contract with Oklahoma Native Plant Society for promoting wildlife heritage through education (*id.*, 161a); 1104.12 (remainder deposited into Oklahoma Quarter Horse Revolving Fund to be expended by Oklahoma Horse Racing Commission for support of any statewide organization dedicated to promoting American Quarter Horse breed) (*id.*, 165a).

[8] *See generally* 47 Okla. Stat. §§ 1104 (App. F, 141a-151a); 1135.3(C) (App. E, 113a); 1135.5(C) (*id.*, 134a-135a); 1135.7(D) (*id.*, 137a-138a).

When this lawsuit began, the statutory scheme authorized the OTC to make available for immediate purchase 110 different special license plates displaying particular views about various subjects. Each reflects one or more of the following four categories of self-expression: *(a)* support for a cause, idea or hobby; *(b)* support for an institution, entity or occupation; *(c)* membership in a particular group; and *(d)* vehicle usage. Two plates – one displaying the expression "choose life" (§ 1135.5(B)(22) (App. E, 127a)), and one displaying the expression "adoption creates families" (§ 1135.5(B)(23) (*id.*, 127a)) – allow Oklahoma motorists to express support for a "pro-life" view about women's reproductive options. All of the proceeds from sales of the so-called "Choose Life" special license plate must be disbursed by the state directly to certain private, non-profit organizations that also support a "pro-life" view about women's reproductive options. § 1104.6 (App. F, 156a-160a). Proceeds from sales of the so-called "Adoption Creates Families" special license plate are used to fund state adoption programs. § 1135.5(B)(22) (App. E, 127a).[9]

Nearly four years ago, petitioners sought passage of an amendment to the statutory scheme that would authorize for immediate purchase a special license plate expressing support for a "pro-choice" view about women's reproductive rights. A bill containing this amendment languished in the Oklahoma Senate Finance Committee until its official death in May 2004 (having failed passage during the first or second regular sessions after its introduction). App. B, 57a. No other bill was ever introduced authorizing for immediate purchase petitioners' desired special license plate. However, the Oklahoma legislature

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[9] Examples of other special license plates available today for immediate purchase include: 47 Okla. Stat. §§ 1135.3(B)(1) ("Round and Square Dance License Plates") (App. E, 103a); 1135.3(B)(3) ("National Rifle Association License Plates") (*id.*, 103a); 1135.3(B)(6) ("Balloonists License Plates") (*id.*, 104a); 1135.3(B)(24) ("Fellowship of Christian Athletes License Plates") (*id.*, 108a); 1135.3(B)(25) ("Parrothead Club License Plates") (*id.*, 109a).

and Governor have repeatedly amended the statutory scheme over the last four years to authorize for immediate purchase "new" special license plates (*i.e.*, ones not already codified in the scheme) expressing views about other subjects.

After petitioners filed this lawsuit, the Oklahoma legislature and Governor further amended the statutory scheme by adding §§ 1135.7 and 1135.8. The additional provisions authorize the sale of any "new" special license plate, but only after the OTC first receives 500 pre-paid applications for each plate. "Existing" special license plates (*i.e.*, those already codified in the scheme) are not subject to that requirement. The additional provisions also do not prohibit the Oklahoma legislature and Governor from authorizing "new" special license plates that are exempt from the 500 pre-paid applications requirement. § 1135.7(H) (App. E, 139a). In fact, following the addition of §§ 1135.7 and 1135.8, the statutory scheme has been further amended to include over 10 such plates.[10]

There remains no special license plate available for purchase by any Oklahoma motorist who would like to express a "pro-choice" view about women's reproductive options in this state-created private speech forum – notwithstanding that those motorists who wish to express a different view on the same subject are permitted to do so (as they have been for nearly five years).

B. The Decision of the District Court

Respondents moved in the district court to dismiss the First Amended Complaint in its entirety on various grounds. On August 16, 2005, the district court held *sua sponte* that federal

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[10] "New" special license plates recently authorized by the Oklahoma legislature that are exempt from the 500 pre-paid application requirement include: 47 Okla. Stat. §§ 1135.3(B)(33)-(35) & (37)-(40) (each expressing support for a particular fraternity or sorority) (App. E, 110a-112a); 1135.5(B)(34) ("Global War on Terrorism License Plate") (*id.*, 131a).

courts lack original jurisdiction under the Tax Injunction Act to hear petitioners' claims (Counts One through Four).[11] App. B, 71a.

The district court's dismissal of petitioners' claims resulted from three separate errors. *First*, the district court incorrectly concluded that any amount of money paid by a citizen to the state must be either a regulatory fee or a tax. *Id.*, 59a. *Second*, in applying this superficial dichotomy, the district court wrongly concluded that the amounts voluntarily paid by those Oklahoma motorists who choose to purchase special license plates are taxes. *Id.*, 63a. *Third*, the district court mistakenly concluded in a single footnote that *Hibbs v. Winn*, 542 U.S. 88 (2004), precluded a finding that petitioners' claims are outside the scope of the Tax Injunction Act. *Id.*, 58a-59a.

The district court began its consideration of petitioners' claims with the flawed understanding that it was required to "determine whether the extra amounts charged for specialty plates constitute taxes, for the purposes of the statute, or whether they are merely regulatory fees." *Id.*, 59a. This understanding apparently derived from the district court's reading of *Marcus v. Kansas Department of Revenue*, 170 F.3d 1305 (10th Cir. 1999), the authority setting forth the Tenth Circuit's test for distinguishing regulatory fees from taxes. However, *Marcus* does not hold – and the district court did not cite any authority

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[11] Plaintiff-appellant Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. challenges in Counts Five and Six of the First Amended Complaint the eligibility criteria embodied in 47 Okla. Stat. §§ 1104.6(C)(4) and 1104.6(D) (App. F, 158a-159a) for disbursements from proceeds of sales of the special license plate displaying the expression "choose life" because the challenged criteria condition state funding on abstention from privately-funded protected speech. The district court dismissed those claims for lack of jurisdiction under the Eleventh Amendment. App. B, 71a. The court of appeals reversed (App. A, 3a), and no defendant-appellee has petitioned for *certiorari* as to Counts Five and Six.

holding – that all payments to the state are necessarily either regulatory fees or taxes.

After restricting itself to this dichotomy, the district court correctly found that "the extra assessments for specialty license plates are paid only by a subset of license plate purchasers as would support the argument that the charges are imposed 'only upon those the scheme regulates' [*i.e.*, those motorists who wish to speak in the forum] and therefore constitute fees." App. B, 61a. The district court further correctly found that $8 of the extra amount paid for each special license is unquestionably "regulatory in nature." *Id.*, 63a. However, the district court held that these factors were outweighed in part by the fact that the purchase prices of special license plates are set by the legislature, as opposed to a regulatory body (App. B, 61a), and in part because any amount exceeding the $8 "regulatory" component of the purchase price was revenue used by the state for purposes "unrelated to the administration of motor vehicle . . . law" and for the "public benefit." *Id.*, 61a. Accordingly, the district court concluded that the total amount voluntarily paid for each special license plate is a tax because it lacks sufficient characteristics of regulatory fees.

In reaching this conclusion, the district court ignored several other key and indisputable facts: *(a)* that the only individuals who pay the amount charged for special license plates are those who voluntary choose to purchase them to express a particular view; *(b)* the purchase price for the overwhelming majority of special license plates is either $8 or $15 – and therefore either the state earns no revenue on those plates or the regulatory component of the purchase price exceeds the "revenue" component; *(c)* for special license plates that cost $35, the "revenue" component of the purchase price is essentially funneled directly from the state to private entities to fund activities consistent with the views expressed on those plates – and any "benefit" from such activities first inures to the motorists who purchased the plate for this reason; *(d)* the primary purpose

of the special license plate scheme is not to raise revenue, but rather to restrict access to a private speech forum; and *(e)* if, in fact, the primary purpose of the special license plate scheme were to raise revenue, its maximum revenue raising potential would not be compromised by making it more difficult – through viewpoint discrimination – for certain plates to be sold to a larger group of motorists.

Having wrongly determined that the amounts paid for special license plates are taxes (because they are not regulatory fees), the district court finally concluded that petitioners' claims did not fall within any "exception" to the Tax Injunction Act's jurisdictional bar. The only "exception" the district court looked to, however, was one it deemed to have been created by this Court's decision in *Hibbs v. Winn*. According to the district court, "[t]he *Hibbs* exception" provides that federal courts are not deprived of original jurisdiction over third-party claims (*i.e.*, claims asserted by plaintiffs who do not dispute their own state tax liabilities) **only** if "the suit's successes will enrich, and not deplete, the government entity's coffers." *Id.*, 58a-59a. The district court correctly found petitioners to be asserting third-party claims. It wrongly found, however, that "an injunction against the license plate program's operation would reduce state revenues[.]" *Id.* 59a. This finding was erroneous because enactment of a constitutional special license plate scheme (*i.e.*, one that is not viewpoint discriminatory) would create more revenue by opening the forum to the expression of more views by more motorists, thereby generating more sales.

Even if the district court were correct that petitioners' requested relief ultimately would cause the state to experience a reduction in revenues from special license plate sales, the district court should have considered petitioners' argument that their claims in any event were not subject to the Tax Injunction Act's jurisdictional bar. In refusing to do so, the district court ignored the comprehensive analysis in *Hibbs* of the Tax Injunction Act's legislative history – which reflects Congress's

intent solely to apply the Tax Injunction Act to claims asserted by taxpayers disputing the calculations of their own state tax liabilities – and further ignored that *Hibbs* nowhere purports to address the applicability of the Tax Injunction Act to situations where, as here, petitioners do not **directly** challenge a state tax credit, which was the claim presented by *Hibbs* (or even a state tax).

C. The Decision of the Court of Appeals

On March 6, 2007, the court of appeals affirmed the district court's dismissal of petitioners' claims under the Tax Injunction Act.[12] App. A, 3a. This decision widened an existing split among the circuit courts over the applicability of the Tax Injunction Act to substantially similar claims asserted by motorists across the country challenging virtually identical state special license plate schemes.

The court of appeals purported to reject wholesale the district court's understanding that any amount paid to a state necessarily must be either a regulatory fee or a tax; as Judge Gorsuch explained, "we do not for a moment doubt that the State can obtain funds through means other than 'taxes' and 'fees.'" *Id.*, 30a. Nevertheless, the court of appeals rejected the analysis underlying the Sixth Circuit's conclusion in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006), that amounts paid for special license plates are neither regulatory fees nor taxes, but ordinary contractual debt. In so holding, the court of appeals essentially agreed with the district court's erroneous conclusion that the

[12] Before turning to its analysis of the Tax Injunction Act, the court of appeals held as an initial matter that petitioners' claims (and thus the appeal of their dismissal) were not mooted by the addition of §§ 1135.7 and 1135.8 to the statutory scheme because – even as amended – the scheme imposes "a non-trivial and arguably discriminatory burden" on the expression of certain viewpoints. App. A, 11a-12a (noting that "a difference arguably preferring one competing viewpoint over another remains embedded in Oklahoma law").

total amount paid for each special license plate must be a tax because it is not a regulatory fee. The court of appeals also agreed with the district court's erroneous conclusion that petitioners' claims are among those that Congress intended to bar from original federal jurisdiction by the Tax Injunction Act.

The court of appeals' analysis first looked to dictionary definitions of the term "tax" (taken from the early twentieth century through today) to support the erroneous holding that any amount set and collected by the state must be a tax if it generates revenue. *See id.*, 13a-16a. For example, quoting from one of several similar definitions, the court of appeals observed: "[Oklahoma] plainly imposes a charge for a thing. And through its statutory [special license plate] regime, the Oklahoma Legislature generates and distributes funds for a wide variety of public purposes." *Id.*, 13a. This observation fails to recognize, however, that every seller "imposes" a "charge" for any "thing" that is voluntarily purchased by a buyer. In holding that any revenue earned by the state – that is, any amounts collected in excess of the state's costs of providing a "thing" (or, here, a special license plate) – constitutes a tax, the court of appeals effectively applied the same regulatory fee-tax dichotomy with which it so strongly claimed to disagree.

The same contradiction is evidenced by the court of appeals' lengthy discussion of, and reliance on, both Judge Cooley's test for "distinguish[ing] between taxes and fees and even how to categorize assessments that appear to have characteristics of both" (*id.*, 14a), and "[Tenth Circuit] precedent in *Marcus*" (*id.*, 18a). The court of appeals' conclusion that (as between a regulatory fee and a tax) the amounts paid for special license plates are more characteristic of taxes is just as flawed as the district court's analysis in this regard. The court of appeals' supposition "that the primary purpose of the special license plate scheme is revenue rather than regulation" (*id.*, 15a) is unsupported and completely disregards that the scheme would not generate any revenue at all did it not have as its primary

purpose the creation of a private speech forum.[13] Indeed, the court of appeals – like the district court – does not provide any rationalization why the state would choose to make it more difficult for certain motorists (*i.e.*, those with whose view the state disagrees) to purchase special license plates than others if the scheme's main objection were to generate as much revenue as possible.

The court of appeals next considered the Sixth Circuit's decision in *Bredesen* that the amounts paid by motorists to the state for Tennessee's special license plates are neither regulatory fees nor taxes, but contractual debts reflecting ordinary purchases by motorists from the state. Judge Gorsuch initially expressed the panel's "reluctance to decide . . . with finality" whether it agreed with the Sixth Circuit's analysis. *Id.*, 29a. Although this "reluctance" stemmed from the panel's view that the argument had not been timely presented on appeal, the record is replete with evidence that the argument was properly before the court of appeals. For example: *(a)* petitioners consistently argued that the Tax Injunction Act did not apply because the purchase prices of special license plates are not taxes; *(b)* assuming the district court's regulatory fee-tax dichotomy were affirmed, petitioners were compelled to argue in their opening appellate briefs that, if properly subject to the dichotomy imposed by the district court's decision, the purchase prices are more characteristic of regulatory fees than taxes; *(c)* petitioners timely submitted a Fed. R. App. P. 28(j) submission apprising the court of appeals that the Sixth Circuit's *Bredesen* decision addressed the same outcome-determinative legal issue presented

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[13] The court of appeals' observation that the regulatory fee-tax dichotomy has been applied for purposes of determining whether an amount paid to the state violates Article I of the United States Constitution – and hence "that taxes **under State law** can include many assessments that may not be taxes for purposes of **federal** law" (App. A, 21a (emphasis in original)) – is of no consequence. None of the cases cited in this discussion apply the dichotomy in the context of the Tax Injunction Act, the only context relevant here.

in this appeal as applied to virtually identical facts; *(d)* petitioners discussed the Sixth Circuit's analysis in their appellate reply brief; and *(e)* petitioners, like respondents, were extensively (and almost exclusively) questioned by the court of appeals during oral argument about the Sixth Circuit's analysis.[14]

Moreover, the panel's reluctance to "decide with finality" whether amounts paid for special license plates are, as the Sixth Circuit held, ordinary contractual debts (and not taxes), is belied by its ensuing eight-page comprehensive analysis and rejection of that precise argument. *Id.*, 29a-33a. That discussion at the very least implicitly directed all Oklahoma district courts to reject the Sixth Circuit's analysis.

The panel's discussion of the Sixth Circuit's analysis began with the acknowledgement that:

> [Special license plate charges are] for a discretionary product that the state is offering, and it is purely up to the consumer to decide whether to buy it. The extra words on the specialty plate are not necessary to exercise the privilege regulated by the state – *i.e.*, driving. The basic [] charge covers the privilege of driving, and the incremental cost may simply be a commercial price paid by a willing motorist to purchase a license plate with a slogan that is pleasing to the motorist.

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[14] Even if the court of appeals were correct about the timeliness of this argument, exercise of the panel's discretion to consider it was plainly warranted. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *Hormel v. Helvering*, 312 U.S. 552, 557 (U.S. 1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.").

Id., 32a. Instead of converting this logical and accurate acknowledgment into a factual finding, the court of appeals refused to hold that amounts paid for special license plates are not taxes because they are ordinary contractual debts as between a willing buyer and seller.

The refusal to reach this holding was premised on the court of appeals' turning a blind eye to two realities of the marketplace. *First*, Judge Gorsuch opined that a motorist who voluntarily purchases a "a fancier car" can be said to incur voluntarily the accompanying luxury tax. He concluded from this opinion that a motorist who voluntarily purchases a special license plate similarly can be said to incur voluntarily the special license plate charge – and therefore that the voluntariness of a purchase is not dispositive of whether the payment made for a special license plate is or is not a tax. *Id.* Of course, this analogy ignores that the purchase price a motorist pays to the dealership is indisputably not a tax. In the case of special license plates, that the seller is – and thus that the purchase price is paid to – the state rather than a private entity does not transform the total payment into a tax. *Second*, the state's position as a monopoly seller of special license plates similarly does not somehow transform the otherwise "ordinary purchase" of a special license plate into payment of a tax. *Id.*, 30a-32a. The fact that customers may not always have a choice of suppliers from which to buy a commodity – and thus may not be able to drive the price of that commodity down – does not change the voluntary nature of the decisions to purchase these items regardless of price.

The court of appeals finally considered whether – irrespective of its holding that amounts paid for special license plates are taxes – petitioners' claims are among those Congress intended to be barred by the Tax Injunction Act. The conclusion that such claims are barred is the second of two outcome-determinative errors in the court of appeals' analysis (the first being that payments for special license plates are taxes) and

reflects a misapprehension of petitioners' argument. The court of appeals construed petitioners' argument to be only that this Court previously instructed that any and all third-party claims – regardless of their nature – are not subject to the Tax Injunction Act's jurisdictional bar. As the panel described:

> Motorists contest the application of [Tax Injunction Act] on the ground that they are not seeking to challenge an assessment imposed on them, but rather assessments imposed on and paid by other persons or entities. This, they argue, is an essential and dispositive distinction under the Supreme Court's teaching in *Hibbs v. Winn*.

Id., 23a-24a. To be sure, petitioners argued that the Court's analysis in *Hibbs* of the Tax Injunction Act's legislative history demonstrates an intent to bar only claims asserted by taxpayers challenging their own state tax liabilities. Yet petitioners also argued – and the court of appeals overlooked – that *Hibbs* does not preclude a finding that petitioners' claims in this case are not barred by the Tax Injunction Act, because Hibbs involved a third-party's direct challenge to a state tax credit. Such a challenge differs both in degree and kind from claims that (as here) would exist even if no taxes were in any way implicated by the underlying claims or requested relief.

REASONS FOR GRANTING THE PETITION

Three independent reasons demonstrate a pressing need for this Court's action and, whether considered individually or collectively, provide a basis for granting the petition.

First, the decision of the court of appeals in this case directly conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006) – as well as the view of eight vigorously dissenting Fifth Circuit judges in the denial of rehearing *en banc*

in *Henderson v. Stalder*, 434 F.3d 352 (5th Cir. 2005), *cert. denied sub nom*; *Keeler v. Stalder*, __ U.S. __, 126 S. Ct. 2967 (2006) – that virtually identical challenges to state special license plate schemes (in Tennessee and Louisiana, respectively) were not barred by the Tax Injunction Act.[15] The court of appeals' decision also implicitly conflicts with the decision of three other circuit courts to address the merits of such challenges (including a challenge where plaintiffs alleged that the scheme impermissibly discriminated against the expression of a "pro-life" view about women's reproductive options) without questioning their jurisdiction to do so under the Tax Injunction Act. Moreover, that special license plates displaying the expression "choose life" are available for purchase in at least fifteen other states, coupled with pending legislation to make "choose life" plates available for purchase in at least eleven more states, leaves little question that the circuit split is poised to deepen without this Court's immediate guidance.

Second, the court of appeals' decision is at odds with this Court's interpretation of the Tax Injunction Act in *Hibbs v. Winn*, 542 U.S. 88 (2004). This case, like *Hibbs*, involves third-party claims asserted by petitioners who do not dispute their own state tax liabilities. *Hibbs* presented the Court with the first-impression question of whether the Tax Injunction Act bars such petitioners from asserting direct challenges to state tax credits. Although this case presents the Court with a different first-impression question – whether the Tax Injunction Act bars third-party petitioners from asserting claims that do not involve direct

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[15] *See also Women's Resource Network v. Gourley*, 305 F. Supp.2d 1145, 1153-54 (E.D. Cal. 2004) (Tax Injunction Act did not bar challenge seeking to enjoin California special license plate scheme for impermissibly discriminating against "pro-life" view, *no appeal taken*); *but see NARAL Pro-Choice Ohio v. Taft*, 2005 U.S. Dist. LEXIS 21394, No. 1:05-CV-1064 (N.D. Ohio Sept. 27, 2005) (Tax Injunction Act barred challenge seeking to enjoin Ohio special license plate scheme for impermissibly discriminating against "pro-choice" view), *appeal voluntarily dismissed*, No. 1:05-cv-0164 (6th Cir. Sept. 18, 2006).

challenges to any aspect of the state's tax system – the Court's comprehensive analysis in *Hibbs* of the Tax Injunction Act's legislative history leaves no doubt that Congress did not intend to exclude such claims from original federal jurisdiction.

Third, the decisions below present important questions of first impression in this Court concerning *(1)* whether the amount paid for a special license plate is or is not a tax under the Tax Injunction Act, and *(2)* whether, even if such amounts constitute taxes for this purpose, the Tax Injunction Act bars claims that do not challenge either the calculation of any tax liability or the validity of any particular tax. In answering both questions affirmatively, the lower courts applied the Tax Injunction Act in a sweeping manner that not only insulates from original federal jurisdiction petitioners' claims and unconstitutional special license plate schemes generally, but also provides state legislatures with a roadmap for similarly insulating **any** private speech forum. *Certiorari* should be granted to prevent future use of the Tax Injunction Act to shield unconstitutional action by state officials from the judicial review to which it properly is subject before reaching this Court – that of the federal district and circuit courts.

I. The Circuit Courts Are Split Over Whether The Purchase Price Of A Special License Plate Is Or Is Not A Tax.

The court of appeals' holding that the amounts paid by motorists for special license plates are taxes, while comporting with the Fifth Circuit's holding in *Henderson*, squarely conflicts with the Sixth Circuit's decision in *Bredesen* (as well as the views of eight vigorously dissenting judges from denial of rehearing *en banc* in *Henderson*) that the Tax Injunction Act does not deprive federal district courts of jurisdiction over a challenge to a viewpoint discriminatory special license plate scheme because the amount paid by motorists who choose to purchase special license plates is **not** a tax.

The Sixth Circuit expressly rejected the regulatory fee-tax dichotomy adopted in *Henderson* and, for all intents and purposes, applied by the court of appeals in this case. As the Sixth Circuit explained, "[t]he test for determining which compelled exactions are taxes and which are fees cannot logically be used to determine whether a payment is a compelled exaction in the first place." *Bredesen*, 441 F.3d at 375. For this reason, the Sixth Circuit expressed its "substantial agreement" with the dissenting eight Fifth Circuit judges who believed that *Henderson* should be reheard *en banc*:

> "[T]he relevant question is whether this charge is a tax and if the answer to this question is no, the [Tax Injunction Act] does not apply regardless of whether the charge is characterized as a regulatory fee, a charitable donation or something else." Thus, even though the Fifth Circuit dissent found the charge for the Louisiana "Choose Life" plate not to be a regulatory fee, the charge was not a tax either, in part because "the charge is not 'imposed' by the legislature; because it is entirely optional and voluntary on the part of the Louisiana citizens electing to pay the extra charge for the specialty plate."

Bredesen, 441 F.3d at 375 (quoting *Henderson*, 434 F.3d at 354-55 (Davis, J., dissenting)).[16]

The Sixth Circuit instead began its analysis by looking to this Court's discussion of the "long-standing distinction . . . between taxes and ordinary debts" as set forth in *New Jersey v. Anderson*, 203 U.S. 483 (1906), *Florida C. & P. R. Co. v.*

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[16] *See Women's Resource Network*, 305 F. Supp.2d at 1153-54 (finding that amounts paid for California special license plates are not taxes because they "are imposed only on motorists who voluntarily" purchase the plates to provide financial and express other expressing other support for cause displayed on plates).

Reynolds, 183 U.S. 471 (1902), *Patton v. Brady*, 184 U.S. 608 (1902) and *Meriwether v. Garrett*, 102 U.S. 472 (1880), and their progeny. One such case was a Fifth Circuit decision – a case curiously ignored in *Henderson* – that applied this Court's "definition of tax in *Anderson* to hold that a challenge to the state's collection of lease rental payments was not subject to the Tax Injunction Act" because "[t]he lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are." *Bredesen*, 441 F.3d at 374 (citing *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500 n.13, *reh'g denied*, 277 F.3d 1375 (5th Cir. 2001)). The Sixth Circuit elaborated:

> The [*Lipscomb*] analysis would apply *a fortiori* to ordinary purchases, like the purchase of government bonds, or the purchase of a souvenir at a state park gift store. Such purchase payments can hardly be termed "taxes" as opposed to ordinary payments on voluntary contracts. This conclusion follows, moreover, regardless of what the government does with the sales income.
>
> In this case, Tennessee's sale of specialty plates creates contractual debts to pay but imposes no tax. Instead of using its sovereign power to coerce sales, Tennessee induces willing purchases as would any ordinary market participant. The government confers all the same driving privileges on people who forgo specialty plates to buy standard-issue plates. Drivers' only motive for buying such plates, therefore, must rest with the attractiveness of the "Choose Life" message as Tennessee has marketed it, not a desire to obey Tennessee's will. Under *Anderson* and *Lipscomb*, these sales constitute regular contractual payments, not taxes.

Id.; *see also id.* at 373 (explaining that payments for special license plates "are most closely analogous to payments for

simple purchases from the government" that "are not taxes under the [Tax Injunction Act]").

For these reasons, the Sixth Circuit concluded that "[u]nder the Supreme Court's basic definition of a tax, logically applied in *Lipscomb*, the [Tax Injunction Act] does not preclude federal jurisdiction over the plaintiffs' claims in this case." *Id.* at 375. The contrary opinions of the Fifth and Tenth Circuits thus present an unusually sharp conflict on an important question of federal jurisdiction over claims presenting equally important constitutional questions that involve freedom of speech.

The court of appeals' decision in this case also implicitly conflicts with the decisions of three other circuit courts (the Fourth, Seventh, and Eleventh Circuits) to consider challenges involving special license plate schemes without first questioning – either in response to the parties' arguments or *sua sponte* – their jurisdiction to do so under the Tax Injunction Act.

Two of those decisions – *Planned Parenthood v. Rose*, 361 F.3d 786, *reh'g denied*, 373 F.3d 580 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005), and *Women's Emergency Network v. Bush*, 323 F.3d 937, *reh'g denied*, 67 Fed. Appx. 591 (11th Cir. 2003) – were issued prior to the Fifth Circuit's decision in *Henderson* and the Sixth Circuit's decision in *Bredesen*. In *Rose*, the Fourth Circuit affirmed that South Carolina's special license plate scheme was viewpoint discriminatory and upheld an injunction against further enforcement of a statute authorizing the sale of "choose life" special license plates – even though both the original and *en banc* panels clearly understood that doing so would (at least temporarily) result in loss of revenue to the state. *See* 361 F.3d at 788 (noting that "[s]ale of the Choose Life plate is expected to generate additional revenue for the State; the fee for the special plate is seventy dollars every two years in addition to the regular fee"). In *Women's Emergency Network*, the Eleventh Circuit did not reach the merits of plaintiffs' challenge to Florida's special license plate scheme because jurisdiction was lacking – but only because the plaintiffs

lacked standing to seek an injunction against further enforcement of a Florida statute authorizing the sale of "Choose Life License Plates" for an additional $20 payment.

The third case, *Choose Life Illinois, Inc. v. White*, 2007 U.S. Dist. LEXIS, No. 04-C-4316 (N.D. Ill. Jan 19, 2007) (unpublished memorandum opinion and order), is pending in the Seventh Circuit on appeal from a district court decision that was issued after both the Fifth Circuit's denial of rehearing *en banc* in *Henderson* and the Sixth Circuit's decision in *Bredesen*. In *Choose Life Illinois*, the plaintiffs alleged that the state's refusal to sell "choose life" license plates was the result of viewpoint discrimination, and the requested relief included an injunction against further enforcement of the scheme. The district court granted plaintiffs' summary judgment motion without any discussion of the Tax Injunction Act. Although appellate briefing was completed on August 24, 2007 (nearly six months after the court of appeals issued its decision in this case), and although an issue on appeal is whether the district court erred in denying defendants' motion for summary judgment on plaintiffs' claim that the Illinois scheme was facially unconstitutional (and thus should be enjoined in its entirety), the parties have not raised the Tax Injunction Act as an issue on appeal.

The Seventh Circuit's decision in *Choose Life Illinois*, whether addressing the underlying challenge without mention of the Tax Injunction Act or not, is certain to widen the existing circuit split. And the split is likely to be widened even further based on the work of Choose Life, Inc., a private non-profit organization actively lobbying for the sale in all fifty states of special license plates displaying the expression "choose life."[17] As a result of those efforts, "choose life" plates are also available for purchase in: Alabama, Arkansas, Connecticut, Georgia, Hawaii, Indiana, Kentucky, Maryland, Mississippi, Montana,

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[17] *See generally* Choose Life License Tag Web Site, http://www.choose-life.org (last visited Aug. 29, 2007).

New Jersey, New York, Pennsylvania, and South Dakota. Efforts are also under way to make such plates available for purchase in: Colorado, Delaware, Iowa, Massachusetts, Michigan, Nevada, New Hampshire, North Carolina, North Dakota, Virginia, and Washington.[18] If history is any indication, it is only a matter of time before the district courts in these states are presented with the same issue giving rise to the circuit split in the first instance: whether challenges to viewpoint discriminatory special license plate schemes are barred by the Tax Injunction Act.

The Court's immediate review is therefore necessary to resolve the growing circuit split on this threshold jurisdictional issue and ensure that motorists across the country – whether they seek to express a "pro-life" or a "pro-choice" view about women's reproductive options – have a federal forum in which to raise challenges to state special license plate schemes.[19]

II. The Circuit Courts Are Wrongly Interpreting The Tax Injunction Act's Legislative History And Misapplying *Hibbs v. Winn*, 542 U.S. 88 (2004).

Both the court of appeals and the Fifth Circuit in *Henderson* held that the Tax Injunction Act strips federal courts of original jurisdiction over any and all third-party claims (*i.e.*, claims asserted by plaintiffs who do not challenge the calculation of their own state tax liabilities) if the requested relief would involve a net revenue loss to the state. The Sixth Circuit, in contrast, did not have to reach this question after holding that

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[18] *See* Choose Life Newsletter (Choose Life, Inc., Ocala, Fla.), Aug. 17, 2007, http://www.choose-life.org/newsletter.html.

[19] *See* Brianne J. Good, Comment, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 Yale L.J. 727, 733 (Dec. 2005) (citing *Heck v. Humphrey*, 512 U.S. 477, 500 (1994) (Souter, J., concurring) (observing that there must be some federal forum available in which individuals can sue state officials)).

the amounts paid for special license plates are not taxes. Nevertheless, the Sixth Circuit expressed skepticism that the Tax Injunction Act would apply in any event to a challenge to a viewpoint discriminatory special license plate scheme.

> In *Hibbs*, the Supreme Court . . . explained that "in enacting the [Tax Injunction Act], Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." The Court also noted that cases applying the [Tax Injunction Act] generally "involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)." Plaintiffs in this case are of course not seeking to avoid paying for a "Choose Life" license plate, and it is therefore at least questionable whether the [Act] would apply even if the payment for the license plates were a "tax."

Bredesen, 441 F.3d at 373, n.12 (quoting *Hibbs*, 542 U.S. at 104-106). In fact, the legislative history and this Court's jurisprudence leave no room for debate: petitioners' challenge was never intended by Congress to be subject to the Tax Injunction Act's jurisdictional bar.

The Senate and House Reports supporting enactment of the Tax Injunction Act reflect that it was intended to apply exclusively to challenges to taxpayers' own state tax liabilities (and not to **any** challenges brought by third-parties). *See* S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); H. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937); 81 Cong. Rec. 1416 (1937). All of the examples provided in these legislative materials to justify the jurisdictional bar involve plaintiffs withholding from state tax authorities payments of their own disputed tax liabilities pending resolution of the disputes in federal court. By doing so, those plaintiffs refused to avail themselves of pre-existing state procedures designed to resolve issues about the propriety

of state tax calculations – after payment was first made to the state. Congress was concerned that allowing plaintiffs – and specifically, foreign corporations doing business in a state – to bypass state "protest" procedures in this manner would result in plaintiffs withholding "taxes in such vast amounts and for such long periods as to seriously disrupt State and county finances." *Id.*

Accordingly, Justice Ginsburg acknowledged throughout the majority opinion in *Hibbs* that Congress intended to bar from lower federal court review only taxpayers' challenges to the calculation of their own state tax liabilities. As she explained:

> In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration.

Hibbs, 542 U.S. at 104; *see, e.g., id.* at 104 ("In . . . 28 U.S.C. § 1341, Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax **imposed on plaintiffs** . . . were outside Congress' purview.") (emphasis in original); *id.* at 104-105. *Id.* at 107 ("[The Court] has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes."); *id.* at 109 ("Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of particular taxes **imposed on them**") (emphasis in original) (internal quotation omitted).

Here, there is no disputed liability for petitioners first to pay to the state and then to seek recovery; no "pro-choice" plate is available for motorists to purchase. And even if such a plate were available, petitioners do not dispute the state's ability to charge motorists for special license plates and would not be seeking a refund of that charge. While the court of appeals, like the Fifth Circuit in *Henderson*, deemed it appropriate to ignore this legislative history and the striking differences between petitioners' claims and those Congress was concerned about removing from lower federal court review, it is for this Court to ensure that courts are constrained to apply federal statutes consistent with legislative intent.

To further support their conclusion that petitioners' claims are barred by the Tax Injunction Act, the court of appeals and the Fifth Circuit each read this Court's decision in *Hibbs* as precluding any alternative holding. But their reading grossly expands the holding in *Hibbs* to facts that were not before the Court. *Hibbs* presented this Court with the first-impression question of whether a third-party's direct challenge to a state tax credit was barred by the Tax Injunction Act. *Hibbs* nowhere purports to have analyzed the applicability of the Tax Injunction Act to all types of third-party challenges. While *Hibbs* might be viewed as instructive in considering whether the Tax Injunction Act bars a third-party's direct challenge to a state tax, there is no indication that in *Hibbs* this Court foreclosed a finding that the Tax Injunction Act is not a jurisdictional bar to claims that, like petitioners' claims in this case, would exist even if no money ever changed hands between plaintiffs and the state.

III. The Court of Appeals' Decision Presents Important Questions With Implications Beyond Special License Plate Schemes.

Whether the amounts paid for special license plates are taxes for purposes of the Tax Injunction Act, and whether claims challenging viewpoint discriminatory special license plate

schemes are subject to the Tax Injunction Act's jurisdictional bar, are important questions for a variety of reasons.

Affirmative answers to both questions have already deprived motorists in at least three states of a federal forum to hear the very same claims that federal district and circuit courts have addressed on the merits when raised by motorists in at least three other states. Similar incongruities surely will result from the existing and growing number of federal lawsuits involving special license plate schemes – lawsuits generated in large part by the coordinated efforts of a private organization seeking to make "choose life" special license plates available for purchase by motorists in every state. Absent this Court's immediate guidance, motorists across the country will continue to be deprived of the federal forum to which they are entitled – and to which some similarly-situated motorists are granted access – for substantive resolution of important First and Fourteenth Amendment issues that are themselves the subject of a circuit split.[20]

But perhaps most importantly of all, the analysis underlying affirmative answers to both questions has far-reaching implications beyond the debate about women's reproductive rights and challenges to special license plate schemes. Simply put, the court of appeals' decision in this case, like the Fifth Circuit's decision in *Henderson* (and contrary to the Sixth Circuit's decision in *Bredesen*), has effectively transformed the

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[20] *Compare, e.g., Rose*, 361 F.3d at 789-92 (South Carolina's special license plate scheme impermissibly discriminated against private speech on basis of viewpoint); *Bredesen*, 441 F.3d at 375-380 (Tennessee's special license plate scheme reflects government speech); *but see Bredesen*, 441 F.3d at 380-92 (Martin, C.J., dissenting) (Tennessee's special license plate scheme impermissibly discriminated against private speech). *See also* Traci Daffer, Comment, *A License to Choose or a Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. Rev. 869 (Spring 2007) (summarizing various substantive issues arising from "choose life" license plate litigation and conflicting judicial resolution of same).

Tax Injunction Act into something it was never meant to be: a means by which state legislatures can create viewpoint discriminatory private speech fora and immunize them from original federal jurisdiction. The following hypothetical illustrates the damaging impact of this transformation far beyond challenges to special license plate schemes.

Suppose that a state legislature enacted a statute specifying which views may be expressed in a public forum (*e.g.*, a park), and that support for the continued presence of U.S. troops in Iraq is one such view. Suppose further that none of those specified views could be expressed unless a willing speaker first made a $35 payment to the state. Also suppose that the state was required to use $8 of that payment to cover the cost of administering the statute (*e.g.*, for security and clean-up), but that the remaining $27 must be distributed by the state to private non-profit organizations for use only in activities publicizing the monetary and other benefits provided to those who join the State National Guard. Additionally, suppose that a group of plaintiffs – each of whom wished to pay $35 to the state for the purpose of expressing in the park their support for immediate U.S. withdrawal from Iraq – challenged the statute in federal district court for creating actual and potential viewpoint discrimination in a speech forum by impermissibly favoring the expression of certain views. And suppose finally that plaintiffs' requested relief was an injunction against the statute's further enforcement in order to level the playing field for the expression of views in park.

The court of appeals' decision, like the Fifth Circuit's decision in *Henderson*, would compel the district court in this hypothetical to invoke the Tax Injunction Act's jurisdictional bar and dismiss the plaintiffs' claims without addressing the merits. More specifically, the court of appeals' decision would compel the conclusion that the $35 payment is a tax, because that amount is "imposed" by the state legislature and generates revenue "from which the entire community benefits" by funding

"State initiatives" such as the "[State] National Guard." The court of appeals' decision also would compel the conclusion that, assuming the $35 payment is a tax, Congress intended for plaintiffs' claims to be barred by the Tax Injunction Act because an injunction against future enforcement of the challenged statute would prevent the state's continued collection of the $35 payment.

There can be no doubt that – but for the proliferation of special license plate litigation over the last few years, the majority of which arose because motorists wish to express on their license plates particular views about women's reproductive rights – federal district courts would not have hesitated to exercise original jurisdiction to decide the merits of the important First and Fourteenth Amendment issues underlying plaintiffs' claims in this hypothetical. The court of appeals' decision in this case, like the Fifth Circuit's decision in *Henderson*, represents an "aggressive run with the [Tax Injunction Act]" that "create[s] a side door for federal judges determined to avoid a constitutional question." *Henderson*, 434 F.3d at 357 (Higgonbotham, C.J. and Wiener, C.J., dissenting). This Court's review is necessary to close that door.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 6, 2007

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 05-5160

HAROLD E. HILL; MARGARET R. MCCRIGHT; WILLIAM F. McCRIGHT; JOHN J. McQUEEN; RITA J. MOSKOWITZ; BARBARA SANTEE; OKLAHOMA RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE EDUCATION FUND, INC.,

Plaintiffs-Appellants,

v.

THOMAS E. KEMP, Chairman, Oklahoma Tax Commission; JERRY JOHNSON, Vice Chairman, Oklahoma Tax Commission; CONNIE IRBY, Secretary-Member, Oklahoma Tax Commission; SCOTT MEACHAM, Treasurer, Oklahoma State Treasury; HOWARD H. HENDRICK, Director, Oklahoma Department of Human Services; BRAD HENRY, Governor of the State of Oklahoma; W.A. DREW EDMONDSON, Attorney General of the State of Oklahoma,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 04-CV-28-CVE-PJC)

Appendix A

Before TYMKOVICH, EBEL, and GORSUCH, Circuit Judges.

GORSUCH, Circuit Judge.

Certain individuals who license and operate their cars in the State of Oklahoma (the "Motorists"), together with the Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC"), argue that Oklahoma's statutory scheme for specialty motor vehicle license plates is unconstitutional under the First and Fourteenth Amendments. In claims one through four of their amended complaint, the Motorists contend that Oklahoma's laws unlawfully discriminate against their views by permitting drivers to obtain license plates bearing the messages "Adoption Creates Families" and "Choose Life" under terms and conditions more favorable than those available to those who wish to have license plates bearing messages of support for abortion rights. In claims five and six, ORC argues that Oklahoma uses proceeds from its specialty license plate program to fund groups involved in adoption-related activities but impermissibly refuses to fund ORC's own adoption-related efforts solely because of its separate and distinct advocacy in favor of abortion rights.

In response to defendants' Rule 12(b) motion to dismiss, the district court dismissed this case on jurisdictional grounds without reaching its merits. Specifically, the district court held that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, passed by Congress to address federal court interference with state revenue raising efforts, precluded it from hearing claims one through four; with respect to claims five and six, the

court concluded that the Eleventh Amendment's guarantee of state immunity from suit in federal court prevented it from exercising review. While we agree with the district court that Congress, through the TIA, has deprived the federal courts of jurisdiction over claims one through four, we hold that the Eleventh Amendment does not preclude consideration of claims five and six on their merits. We thus remand this matter for further proceedings on those counts.

I

A

The Oklahoma Tax Commission ("Tax Commission") is charged with enforcing the State's Vehicle License and Registration Act ("the Registration Act"). Consistent with similar laws across the country, the Registration Act requires that every motor vehicle owner purchase a license plate and display it on his or her car. But, as is also increasingly typical today, the law provides a process by which motorists can pay an additional amount to the Tax Commission to obtain specialty license plates conveying messages ranging from "Veterans of Foreign Wars" to "Round and Square Dancing." *See* 47 Okla. Stat. §§ 1135.2, 1135.3, 1135.5, 1135.6.

Pertinent for our purposes, the Oklahoma Legislature in 2002 and 2004 specifically authorized specialty plates bearing the phrases "Adoption Creates Families" and "Choose Life." 47 Okla. Stat. §§ 1135.5(B)(22) and (23); 2002 Okla. Sess. Laws, ch. 179 § 1 ("Choose Life" plates); 2004 Okla. Sess. Laws, ch. 504 § 14 ("Adoption Creates

Families" plates).[1] These two plates were among approximately 110 specialty plates the Legislature specifically authorized for immediate issuance, albeit with the further instruction that, if fewer than 100 of any kind of plate was issued before a date certain, the Tax Commission could stop issuing that particular plate. 47 Okla. Stat. § 1135.5(A).

The "Adoption Creates Families" and "Choose Life" plates both cost $35 in addition to normal licensing charges. 47 Okla. Stat. § 1135.5(C). For the "Adoption Creates Families" plate, $8 of the $35 charge goes to the Tax Commission Reimbursement Fund for the administration of the Registration Act, 47 Okla. Stat. §§ 1135.5(C)(2); $25 goes to "a revolving fund established in the State Treasury for and to be used by the Department of Human Services [('DHS')] for the implementation of the Investing in Stronger Oklahoma Families Act specifically for created families,"[2]

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1. Special license plates demonstrating support for adoption originally issued in 2001 with the phrase "Respect Life-Support Adoption." 2001 Okla. Sess. Laws, ch. 434 § 12. In 2004, the legislature recodified a portion of the special license plate program, and the adoption-support plates now bear the "Adoption Creates Families" phrase. 2004 Okla. Sess. Laws, ch. 504 §§ 14(B)(22), 22.

2. The Investing in Stronger Oklahoma Families Act was passed in order to "provide assistance to guardians of children, adoptive parents and other 'created families', to assist such guardians, adoptive parents and families to assume permanent custody of children in need of safe and permanent homes, and to enhance family preservation and the stability of these homes." 10 Okla. Stat. § 22.2(B). This law authorizes DHS to provide, *inter alia*, case management services, child care and after school care, transportation, and counseling for adoptive families. *Id.* § 22.2(H).

id. § 1135.5(B)(22); and the remaining $2 is apportioned among school districts, municipalities, and various other state funds, *id.* § 1135.5(C)(3).[3]

For the "Choose Life" plate, $8 is directed to the Tax Commission Reimbursement Fund to cover administrative costs associated with the Registration Act, 47 Okla. Stat. §§ 1135.5(C)(2); $20 goes to "a revolving fund [created in the State Treasury] for the Department of Human Services to be designated the Choose Life Assistance Program," *id.* § 1104.6(B); and the remaining $7 is apportioned among school districts, municipalities, and various other state funds, *see id.* § 1135.5(C)(3); *supra* at note 3. Monies in the Choose Life Assistance Program are disbursed by the State to non-profit organizations that "counsel[ ] pregnant women who are committed to placing their children for adoption." *Id.* § 1104.6(C)(3). By statute, however, organizations are ineligible to receive funds if they are "involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising." *Id.* § 1104.6(C)(4); *see also id.* § 1104.6(D) ("Funds may not be distributed to any organization that is involved or

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3. The specific apportionment of these monies changes from year to year, but for illustrative purposes the money is directed roughly as follows: 36% to school districts according to a funding formula; 45% to the State's general revenue fund; 0.3% to the State Transportation Fund; 11% to the counties according to various funding formulas; about 3% to cities and towns; 1% to the Oklahoma Law Enforcement Retirement Fund; and 0.03% to the Wildlife Conservation Fund. 47 Okla. Stat. § 1104.

associated with abortion activities, including counseling for or referral to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising.").

While many license plates cost $35 and direct a portion of the funds to specific state programs associated with the message on the specialty plate, others cost less and do not direct money to specific initiatives. Thus, for example, a license plate expressing support for the Air Force Academy costs $15, $8 of which is directed to the Tax Commission to cover costs and the remainder of which is directed to school districts, municipalities, and other general state purposes. *See* 47 Okla. Stat. §§ 1135.3(B)(34), 1135.3(C); *supra* at note 3. Certain other license plates issued in recognition of past military service, current public service, and the like, are provided at $8 and funds derived from the sale of these plates are directed exclusively to the Tax Commission to cover administration costs. *Id.* §§ 1135.2(B)(1), (8) & 1135.2(C).

After plaintiffs initiated this lawsuit, the Oklahoma Legislature decided in 2005 to expand the number of specialty plates beyond the 110 or so it had already enumerated. Effective January 1, 2006, the legislature authorized the Tax Commission to design and issue specialty plates demonstrating support for *any* organization, group, or cause so long as the message does not advertise or endorse a product, brand or service, does not promote prejudice, and is not contrary to state civil rights laws. *See* 47 Okla. Stat. § 1135.7. It is undisputed by the parties that the Motorists and ORC can use this new procedure to obtain license plates displaying their preferred messages, including ones voicing support for abortion rights. However, specialty plates issued

under this new law may be issued only after the Tax Commission has received 500 prepaid applications for the particular specialty plate at issue. *Id.* § 1135.7(B)(4).

As with the plates previously authorized by the legislature, specialty plates issued under this new regime may also be designated by their sponsors to provide financial assistance to a state-sponsored initiative or program. Plates designed to provide such assistance cost $35, of which $8 goes to the Tax Commission Reimbursement Fund to defray the cost of the plates, $7 is apportioned among school districts, municipalities, and various state funds, *see id.* § 1135.7(D)(3); *supra* at note 3; and $20 is directed to "a state agency . . . responsible for expending the funds [according to the] specific public purpose" identified with the specialty plate at issue. *Id.* § 1135.7(E). Motorists and ORC do not dispute that they can design plates to provide funding for initiatives they support, including abortion rights. As with the preexisting statutory regime, specialty plates authorized under Oklahoma's new statute that are not associated with a particular state fund or initiative cost $15, of which $8 goes to the Tax Commission Reimbursement Fund and $7 is apportioned among school districts, municipalities, and various state funds. *Id.* § 1135.7(C).

B

ORC is a non-profit organization that provides free services to pregnant women; these services include, *inter alia*, counseling about "all reproductive options" (including adoption and abortion), maintaining a "*Roe*" fund to help cover costs of abortion for indigent women, and

sending its members to "stand as a non-confrontational and peaceful presence outside health facilities providing abortion services." (Am.Compl.¶¶ 24, 26.) Motorists are Oklahoma residents identifying themselves as individuals who support "a woman's freedom to choose among all available reproductive options both before and after conception." (*Id.* ¶ 16.) In claims one through four of the amended complaint, the Motorist plaintiffs allege that Oklahoma's specialty license plates statutory scheme unconstitutionally discriminates against those who wish to show their support for "a woman's freedom to choose among all available reproductive options both before and after conception." (*Id.*) More specifically, they allege that those seeking a special license plate expressing support for abortion rights are not treated equally to those who apply for the "Choose Life" or "Adoption Creates Families" license plates. In claims five and six, ORC challenges the funding restrictions associated with the Choose Life Assistance Program, arguing that the State's refusal to provide funds under this particular program to groups that express support for and engage in advocacy about abortion amounts to an "unconstitutional condition," requiring it to forego its protected First Amendment speech activities in order to qualify for governmental benefits.

As remedy, the Motorists seek injunctive relief and a declaratory judgment that Oklahoma's entire special license plate regime is unconstitutional,[4] while ORC seeks

4. Alternatively, Motorists seek relief affecting only the issuance of "Choose Life" and "Adoption Creates Families" plates. (Am.Compl.¶¶ 164-65.) They do not challenge the "Physically Disabled" and "Hearing Impaired" license plates, 47 Okla. Stat. (Cont'd)

declaratory and injunctive relief preventing the State from enforcing provisions that condition a group's entitlement to receive funds under the Choose Life Assistance Program on a determination that the group is not "involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising." 47 Okla. Stat. § 1104.6(C)(4); *see also* § 1104.6(D).

Plaintiffs filed their suit on January 14, 2004, against various State officials-the Governor, State Attorney General, Treasurer, Director of the Department of Health and Human Services, and certain members of the Oklahoma Tax Commission. Without responding to the merits of plaintiffs' claims, defendants collectively moved to dismiss the case as a matter of law under Federal Rule of Civil Procedure 12(b).[5]

(Cont'd)
§ 1135.1(B)(3) and (5), or plates on which motor vehicle owners are allowed to pick and choose their own numbers, letters or symbols, sometimes known as "personalized" or "vanity" plates, *id.* § 1135.4.

5. Courts in at least two other circuits have reached the merits of similar claims, though their conclusions differ in significant respects. *Compare ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir.2005) (holding that Tennessee's specialty licensing scheme, which included a "Choose Life" plate but not a "Pro-Choice" plate, did not violate plaintiff's First Amendment rights), *with Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir.2004) (holding that South Carolina specialty licensing scheme authorizing a "Choose Life" plate without a pro-choice alternative did violate plaintiff's First Amendment rights). *See also Choose Life Ill., Inc. v. White*, No. 04 C 4316, 2007 WL 178455 (N.D.Ill. January 19, 2007) (following Fourth Circuit precedent and holding unconstitutional Illinois's refusal to issue "Choose Life" license plates).

In its ruling on that motion, the district court dismissed claims one through four on the ground that, through the TIA, Congress denied federal courts the power to hear lawsuits that seek to enjoin the levy or collection of state taxes, and that the collection of assessments associated with the specialty license plate program qualify as taxes under state law. The district court also dismissed claims five and six on the basis that the Eleventh Amendment immunizes defendants from suit in federal court. Finally, the district court held that the Governor and state Treasurer were so tangentially related to the issues in dispute that, whatever else the Eleventh Amendment may require, it commands their individual dismissal under *Ex parte Young,* 209 U.S. 123, 157, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (requiring a plaintiff seeking an exception to Eleventh Amendment immunity to show, *inter alia,* that the state official defendants have "some connection with the enforcement of the act" in question).[6]

II

A

Before assessing Motorists's appeal with respect to claims one through four, we must address defendants' assertion that this portion of the appeal is moot. *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n,* 327 F.3d 1019, 1028 (10th Cir.2003) ("[B]ecause questions of mootness go to our jurisdiction, we are required to address this issue at the outset."). Plaintiffs filed their initial

6. The district court's dismissal of these individuals is not challenged in this appeal.

complaint when Oklahoma had a finite list of approximately 110 specialty plates, including the "Choose Life" plate, but no analog expressing support for abortion rights. Oklahoma's 2005 law changed all that, of course, permitting virtually any group to receive specialty plates voicing support for its cause. Defendants assert (and plaintiffs do not dispute) that Motorists are now free to apply for and receive a specialty plate demonstrating their support for abortion rights and even providing financial support to abortion-related programs. These changed circumstances, defendants argue, moot plaintiffs' complaint with respect to the licensing aspect of this case.

A legislature is, of course, free to amend its own laws at any time and thereby moot ongoing litigation. *Shawnee Tribe v. United States*, 423 F.3d 1204, 1216-17 (10th Cir.2005). Indeed, it is undoubtedly a commendable thing when the people's representatives are able, through the legislative process, to defuse potentially needless constitutional litigation. But, if after passage of the new legislation, a plaintiff still "retain[s] a legally cognizable interest in the outcome, the case is not moot," and we are not free to shirk the responsibility of deciding the remaining controversy before us. *Seneca-Cayuga Tribe*, 327 F.3d at 1028 (internal quotation marks and citation omitted); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).

This is just such a situation. While the Oklahoma Legislature has taken a significant step in allowing groups of all viewpoints to obtain specialty plates, a non-trivial and arguably discriminatory burden remains on those associated

with plaintiffs' point of view. Under Oklahoma's regime, those plates specifically authorized by name by the legislature-including the Choose Life and Adoption Creates Families (among a great many others)-were issued immediately, subject only to the caveat that the Tax Commission could discontinue any plate if fewer than 100 were issued before a prescribed date. 47 Okla. Stat. § 1135.5(A). By contrast, under the 2005 "all comers" statutory rubric, plates expressing support for other causes-including abortion rights-can be issued only if and when the Tax Commission receives 500 prepaid applications within 180 days after the particular plate is authorized. 47 Okla. Stat. § 1135.7(B)(4). Simply put, there remains a difference between how Oklahoma treats those who wish to obtain a Choose Life or Adoption Creates Families plate, on the one hand, and those who wish to obtain a license plate expressing support for abortion rights, on the other. The latter group has to come up with 500 prepaid applications within a specified time frame, while the former group is presumptively grandfathered in. The difference may not be insurmountable or even particularly onerous, but neither does it diminish the fact that a difference arguably preferring one competing viewpoint over another remains embedded in Oklahoma law. Accordingly, we are unable to say definitively that claims one through four are moot.

B

This leaves us confronting directly the question whether, as the district court held and defendants maintain, the TIA precludes our jurisdiction with respect to these claims. In the TIA, Congress succinctly and sweepingly directed that

federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Defendants and the district court argue that the money paid to Oklahoma under the specialty licensing regime falls within the ambit of the statutory phrase "any tax under State law," while plaintiffs contended before the trial court and in briefing before us that the money collected is not a tax but a regulatory fee incident to the State's police powers rather than its taxing authority.

Our starting point is, as it must be, with the plain terms of the law Congress enacted. At the time the TIA was adopted, one contemporaneous dictionary defined the term "tax" as "[a]n enforced, usually proportional, contribution, esp. of money, levied on persons, income, land, commodities, etc., for the support of government and for the public needs; sometimes, a charge, as for a thing." 3 *The New Century Dictionary of the English Language* 1949 (1927). Another dictionary defined "tax" as "[a] charge, esp. a pecuniary burden imposed by authority; specif., a charge or burden, usually pecuniary, laid upon persons or property for public purposes; a forced contribution of wealth to meet the public needs of a government." *Webster's New International Dictionary of the English Language* 2587 (2d ed.1934). Under either definition, Oklahoma's regime involves taxes. Oklahoma here enforces a contribution of money levied on the distribution of a commodity that it asserts the exclusive power, by virtue of its sovereignty, to issue; likewise, it plainly imposes a charge for a thing. And through its statutory

regime, the Oklahoma Legislature generates and distributes funds for a wide variety of public purposes.

Perhaps even more pointedly, Judge Cooley[7] long ago confronted the question how to distinguish between taxes and fees and even how to categorize assessments that appear to have characteristics of both. "Suppose a charge is imposed partly for revenue and partly for regulation," he asked, "Is it a tax or an exercise of the police power?" 1 Thomas M. Cooley, *The Law of Taxation* 98 (4th ed.1924) (hereinafter "Cooley"). Cooley answered: "cases of this nature are to be regarded as cases of taxation. If revenue is the primary purpose, the imposition is a tax. Only those cases where regulation is the primary purpose can be specially referred to the police power." *Id.* at 99 (internal citations omitted); *see also id.* at 109-10 (noting that even fees-such as for recording and filing certificates of incorporation, for inspections, or for docketing legal filings-can be taxes "if the object is to provide general revenue rather than to compensate the officers [who perform the service at issue], and the amount of the fee has no relation to the value of the services. . . . In other words, a charge fixed by statute for the service to be performed by an officer, where the charge has no relation to the value of the services performed and where the amount collected eventually finds its way into the treasury

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7. The Supreme Court has continually cited to Cooley's taxation treatise, referring to him as a "text writer[ ] of high authority." *Parsons v. District of Columbia*, 170 U.S. 45, 55, 18 S.Ct. 521, 42 L.Ed. 943 (1898); *see also, e.g., Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 523-24, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (citing Cooley on Taxation in interpreting TIA's "plain, speedy and efficient remedy" exception).

of the branch of the government whose officer or officers collect the charge, is not a fee but a tax.").

We have no qualms finding in this case that the primary purpose of the special license plate scheme is revenue rather than regulation and thus that it qualifies as a tax under Judge Cooley's formulation. Under Oklahoma's scheme, only $8 of each plate sold goes to the administration of the Registration Act; the remaining funds are collected to be disbursed for a variety of public purposes identified by the Legislature. To be sure, for $35 plates much of the remaining money goes to specific state funds and policy objectives associated with the license plate in question (e.g., $20 in the case of the Choose Life plates and $25 in the case of the Adoption Creates Families plates). But the entire community benefits from this scheme as these funds are variously spread among a wide array of State initiatives-ranging from adoption and urban forestry programs to education, grants for organizations that provide dog or cat spaying and neutering services, and the Oklahoma National Guard, to name just a few. And, of course, a portion of the funds for both the $35 and $15 plates (those demonstrating support for or membership in an organization or cause but not providing financial support, such as the Benevolent Protective Order of Elks or the Parrothead Club, 47 Okla. Stat. §§ 1135.3(16) and (25)) is distributed widely to a variety of municipalities, school districts, and the like, that have no relationship whatsoever to the message on the license plate at issue.

Current definitions of "tax" lead us in the same direction. Black's Law Dictionary defines "tax" as a "monetary charge imposed by the government on persons, entities, transactions

or property to yield public revenue. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyments of the people, and includes duties, imposts, and excises." *Black's Law Dictionary* 1496 (8th ed.2004). Oklahoma's special license plate regime surely involves monetary charges imposed by the government on a transaction to yield public revenue. The Oxford English Dictionary adds that " '[t]ax' is the most inclusive term for these contributions [to the support of government]. . . . In the U.S., 'tax' is more generally applied in ordinary language to every federal, state, or local exaction of this kind." 17 *Oxford English Dictionary* 677 (2d ed.1989).[8]

This plain language understanding of the phrase "any tax under State law" comports with our precedent. In *Marcus v. Kansas, Department of Revenue,* 170 F.3d 1305, 1312 (10th Cir.1999), we held that "[t]he critical inquiry focuses on the purpose of the assessment and the ultimate use of funds." *Id.* at 1311. Faced in *Marcus* (as we are here) with an argument that the assessment at issue amounted to a regulatory "fee" incident to the State's police power rather than a "tax under State law," we identified several identifying characteristics of state taxes:

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8. *See also* Erwin Chemerinsky, *Federal Jurisdiction* 734 (4th ed. 2003) ("Courts have broadly interpreted the [TIA] as preventing federal courts from interfering with virtually all forms of state and local taxes."); *id.* at 735 ("[L]ower courts generally have followed a commonsense approach, finding, for example, that registration fees . . . have the primary purpose of raising revenue and thus should be classified as taxes.").

> [T]he classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to help defray an agency's regulatory expenses.

Marcus, 170 F.3d at 1311 (quoting *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir. 1998)). So we might say that a "classic tax" includes an income tax, imposed by the legislature to defray general state expenses (even though a portion may go to defray the administration of the income tax collection system), while a "classic fee" might be an entry charge imposed by a state park authority to regulate park usage and support only the upkeep of the park.

Applying the considerations set forth in *Marcus*, we cannot help but conclude that they weigh in favor of holding the specialty license plate assessments to be taxes. First, there is no question that the genesis of the special license plate assessment scheme was the Oklahoma Legislature, not some regulatory body; indeed, the amount of each assessment is expressly prescribed by statute. Second, critical under *Marcus* (as it was to Judge Cooley), the specialty plate licensing regime seeks not merely to cover its administrative costs but to raise revenue for a wide array of public purposes. *See supra* at 1244-45. Finally, as the district court pointed out, the funds collected on top of the $8 reimbursement paid to the Tax

Commission do not purport to "regulate" anyone by incentivizing or disincentivizing certain forms of conduct (like, say, controlling the overuse of state parks).

Plaintiffs respond by asking us to look to the facts of *Marcus* rather more than to the rule of law it applied. There, we held that Kansas assessments imposed on drivers for a decal entitling them to use parking spaces reserved for the physically disabled constituted a "fee" rather than a "tax under State law" for purposes of the TIA. We do not disagree that parking passes and specialty plates sound alike. But the statutory regimes before us could not be more different. Kansas chose to charge very little for handicap parking passes ($5.25) and explicitly mandated that the fees imposed by the Department of Revenue for the placards "shall not exceed the actual cost of issuance." Kan. Stat. § 8-1,125(c) (1999). Thus, we emphasized in *Marcus* that the Kansas assessment "is expressly tied to the administrative costs of a specific regulatory scheme and, therefore, its essential character is regulatory." *Marcus,* 170 F.3d at 1312. Here, by contrast, the Oklahoma Legislature has created a statutory scheme whereby the vast bulk of speciality license plates cost their purchasers approximately two and four times the amount necessary to defray the costs of issuing the plates and excess funds are applied to a variety of public purposes. While Oklahoma and Kansas faced a similar issue in their vehicle registration regimes, they chose to address that issue in radically different ways, ways the plain language of the TIA and our precedent in *Marcus* bind us to find dispositive.

Even were we to look beyond the plain language and our controlling precedent in interpreting "taxes under State law," we find other indicia pointing us in the direction of recognizing the Oklahoma assessments as taxes.

In recognition of the breadth of the plain meaning of the term Congress employed, the Supreme Court has expressly instructed that the TIA is to be read as a " 'broad jurisdictional barrier' " and is "first and foremost a vehicle 'to limit dramatically federal district court jurisdiction.' " *Arkansas v. Farm Credit Servs. of Centr. Ark.*, 520 U.S. 821, 825, 826, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997) (quoting *Moe v. Confederated Salish and Kootenai of Flathead Reservation*, 425 U.S. 463, 470, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), and *California v. Grace Brethren Church*, 457 U.S. 393, 408-09, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982)). Thus, the Supreme Court has gone so far as to hold that the *1247 TIA deprived it of jurisdiction even in cases where the defendant State argued in *favor* of federal court review. *See Grace Brethren Church*, 457 U.S. at 417 n. 38, 102 S.Ct. 2498. Given the Court's direction, it would be especially incongruous for us to defy the plain meaning of the term "tax" and our precedent in *Marcus* to assert federal jurisdiction here.

The Supreme Court has also explained that the TIA serves an important role in the smooth operation of our federal system. "The federal balance is well served," the Court has written, "when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from

the Federal Judiciary. The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation. In our constitutional system, . . . [t]he power to tax is basic to the power of the State to exist [and the] . . . [e]nactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government." *Farm Credit Servs. of Cent. Ark.*, 520 U.S. at 826, 117 S.Ct. 1776 (internal citation and quotation marks omitted). To enjoin Oklahoma's entire specialty plate regime (plaintiffs' preferred remedy) or even to enjoin a portion of it (plaintiffs' alternative remedy), would deny Oklahoma the use of significant funds: the law generated approximately $605,000 from the purchase of 33,000 special license plates issued between August 1, 2002, and July 31, 2003, alone. (Am.Compl.¶ 126.) Doing so would further operate to deny these funds to and thus disrupt a variety of state initiatives, ranging from education to environmental to adoption programs, which no party disputes serve legitimate and important state interests. Simply put, the relief sought here would implicate exactly the sort of federalism problems the TIA was designed to ameliorate.

The fact that the term "tax" is modified by the phrase "under State law" also counsels in favor of holding the TIA applicable. Of course, we have held that how a state labels an assessment does not resolve the question whether or not it is a tax (a question Oklahoma has not asked us to revisit). *Marcus*, 170 F.3d at 1311. But that does not mean that the phrase "under State law" is surplusage either; to the contrary, Congress is presumed to have added these words for some purpose. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of

statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)). And, in fact, it has long been understood that taxes *under State law* can include many assessments that may not be taxes for purposes of *federal* law.

Specifically, while the Constitution gave Congress the "Power to lay and collect Taxes," U.S. Const. art. I, § 8, this power is limited in several ways. It has been debated, for example, whether the power to tax afforded by Article I can be delegated by Congress to administrative agencies. *See, e.g., National Cable Television Ass'n, Inc. v. United States,* 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974). Also, taxes must be "uniform" under Section 8 of Article I and, thus, have to apply " 'with the same force and effect in every place where the subject of it is found.' " *Fernandez v. Wiener,* 326 U.S. 340, 359, 66 S.Ct. 178, 90 L.Ed. 116 (1945) (quoting *Head Money Cases (Edye v. Robertson),* 112 U.S. 580, 594, 5 S.Ct. 247, 28 L.Ed. 798 (1884)). Further, Article I, § 9 forbids Congress from leveling direct or capitation taxes except in proportion to the census or enumeration commanded by the Constitution.[9] Aware and perhaps because of these limits, the Supreme Court has come to deem certain assessments as incidents of congressional authority arising from sources other than the (limited) taxing power discussed in Article I. Thus, for example, in *National Cable Television*

9. The Sixteenth Amendment, of course, allows for the imposition of taxes on income (though not other items) without regard to apportionment among the States or to any census or enumeration.

Association, the Court faced a statute that allowed the Federal Communications Commission to prescribe, *inter alia*, a "fee, charge, or price, if any," in order to make the agency work self-sustaining. 415 U.S. at 337, 94 S.Ct. 1146 (quoting 31 U.S.C. § 483a). Mindful of the canon of constitutional avoidance and anxious to "avoid constitutional problems" that it perceived might exist if the statute were read to be an (arguably impermissible) delegation of Congress's taxing power to an administration agency, the Court held that the "fee" was not a "tax" for Article I purposes because it sought only to cover the costs of an associated administrative regulation rather than aid in revenue raising. *Id.* at 340-41, 94 S.Ct. 1146. Similarly, in the *Head Money Cases*, the Court faced an assessment authorized by Congress on vessels bringing passengers from foreign ports. 112 U.S. at 594-95, 5 S.Ct. 247. The plaintiffs argued, among other things, that the law ran afoul of the constitutional requirement that all taxes be applied "uniformly" because it was directed only to persons entering the country by ship, as opposed to by land or by rail. *Id.* at 594, 5 S.Ct. 247. To avoid such potential constitutional difficulties, the Court held that the charge did not arise from the taxing power of Article I, § 8 but instead was a "mere incident" of Congress's separate constitutional power to regulate commerce-what the Court described as "that branch of foreign commerce which is involved in immigration." *Id.* at 595, 5 S.Ct. 247; *see also* U.S. Const. art. I, § 8, cl. 3.

While the Supreme Court has limited what qualifies as an incident of the taxing power for constitutional purposes, it has recognized that its rulings do not necessarily resolve (or even implicate) the question what is a tax for other

purposes, such as "under State law." As the Court put it in the *Head Money Cases*, sums demanded by the government may *not* be authorized pursuant to the "taxing power" of the Constitution but may still be properly deemed taxes in "a loose and more extended sense than was used in the [C]onstitution." *Id.* at 596, 5 S.Ct. 247.

Indeed, in our system of government, States have powers reserved to them that extend well beyond the powers of the national government. *See* U.S. Const. amend. X. These powers include an independent and plenary taxing authority "in the most absolute and unqualified sense." *The Federalist No. 32*, at 199 (Alexander Hamilton) (Carl Van Doren ed., 1979). As exemplified by the dictionary definitions, the plenary authority to tax under state law has historically included a very wide array of extractions of property from private persons by a sovereign for its use that may or may not be incidents of the rather more narrow taxing authority granted in Article I.[10]

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10. It bears mention that our holding is in harmony with that of the Fifth Circuit. In addressing a challenge under the TIA to a specialty license plate scheme in Louisiana, the Fifth Circuit held that the scheme involved "taxes under State law" because the funds collected from the program did not purport to " 'regulate' " anything and "[a] dominant feature of the program, evidenced in over half of the provisions authorizing specialty license plates, is to raise revenue." *Henderson v. Stalder*, 407 F.3d 351, 358 (5th Cir.2005) (Jones, J.). Given that Congress's purpose in passing the TIA was to "prevent federal courts from interfering with challenges to state and local revenue-raising measures," the Fifth Circuit was "unwilling to mischaracterize the Louisiana legislature's appropriations measures as 'fees' in order to achieve federal jurisdiction." *Id.* at 358-59.

Seeking to avoid the conclusion that the TIA bars their claims, Motorists advance two additional arguments that require close attention.

1. Motorists contest the application of the TIA on the ground that they are not seeking to challenge an assessment imposed on them, but rather assessments imposed on and paid by other persons or entities. This, they argue, is an essential and dispositive distinction under the Supreme Court's teaching in *Hibbs v. Winn,* 542 U.S. 88, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004). We are constrained to disagree. Nothing in the language of the TIA indicates that our jurisdiction to hear challenges to state taxes can be turned like a spigot, off when brought by taxpayers challenging their own liabilities and on when brought by third parties challenging the liabilities of others. Rather, Congress plainly directed us that we "shall not enjoin . . . any tax under State law," without qualification-and nothing in *Hibbs* commands a result contrary to the Congress's express direction.

To be sure, the Supreme Court in *Hibbs* faced a plaintiff who sought to challenge the validity of tax credits provided to third parties. And in addressing the defendant's assertion that the TIA barred the plaintiff's claim, the Court did point out that TIA cases typically involve challenges brought by state taxpayers seeking to avoid their own state tax liabilities. *Id.* at 107-08, 124 S.Ct. 2276. But the Court did so not to criticize extant lower court decisions holding that the TIA

bars challenges brought by third parties to State law taxes.[11] Instead, the Court simply sought to underscore how unusual the case before it was compared with most TIA suits. Indeed, the Court proceeded to hold that the essential problem with defendant's assertion that the TIA barred the suit before it lay in the fact that the plaintiff there simply did not seek to enjoin the *levy or collection* of any *tax* under State law, as is typically the case, but instead sought to challenge the *provision* of a *tax credit* aimed at limiting or constraining State tax revenues. *Hibbs,* 542 U.S. at 95, 124 S.Ct. 2276. Simply put, the Court held that giving away a tax credit is a very different thing than assessing, levying or collecting a tax.

The Court explained that the "moorings" of the TIA rest on a "state-revenue-protective" rationale. *Id.* at 106, 124 S.Ct. 2276. *See also id.* at 105, 124 S.Ct. 2276 (emphasizing the protection of "the collection of revenue" as key impulse in the Court's jurisprudence); *id.* at 106, 124 S.Ct. 2276 (noting that prior decision enforcing the TIA was appropriate because "[f]ederal-court relief . . . would have operated to reduce the flow of state tax revenue"). It then proceeded to hold that a challenge brought to a tax credit does not implicate this core concern precisely because the entry of the relief sought by the plaintiffs-the elimination of a tax credit-is not an attack on a State measure aimed at raising revenue. *See id.* at 108-

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11. *See, e.g., Valero Terrestrial Corp. v. Caffrey,* 205 F.3d 130, 132 (4th Cir.2000) (TIA barred challenge by landfill owners and waste transportation companies to a tax imposed on persons disposing of solid waste at landfills; no distinction made between transport company upon whom the tax was imposed and landfill owners merely required to collect tax).

09, 124 S.Ct. 2276. While the TIA embodies an articulated concern about protecting State revenue raising efforts, it simply does not reflect any such concern "about federal courts' flogging state and local governments to collect additional taxes." *Id.* at 109, 124 S.Ct. 2276 (quoting *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir.1986)). Our case, of course, does not involve the somewhat unusual circumstance confronted by *Hibbs* of citizens seeking to eliminate tax credits and "flog" the State to collect more tax revenues, but instead falls in the traditional heartland of TIA cases-an effort expressly aimed at preventing the State from exercising its sovereign power to collect certain revenues.[12]

Plaintiffs respond that enjoining Oklahoma from collecting revenues from the Choose Life, Adoption Creates Families, and other specialty license plates specifically authorized by statute might not reduce state revenues. After all, they say, motorists would remain free to apply for specialty plates under the legislature's 2005 "all comers" law allowing any group with 500 prepaid applications to obtain a plate of their liking. Plaintiffs' submission here, however, is curiously in tension with their response to defendants' mootness argument. There, plaintiffs contended that the legislature's new rule requiring 500 prepaid applications for new specialty plates is considerably more onerous than the legislature's preexisting scheme immediately approving certain plates for issuance. Here, by contrast, plaintiffs seem to suggest that an injunction against the old legislative regime would result in no net revenue loss for the State because a

12. As with our reading of the TIA, our understanding of *Hibbs* accords with the views expressed by the Fifth Circuit in its decision in *Henderson*. *See* 407 F.3d at 359.

one-for-one substitution would take place-with motorists simply migrating from the old to the new licensing regime.

In any event, there is simply nothing in the TIA or *Hibbs* suggesting that federal courts can entertain challenges to state taxes on the basis of predictive judgments that doing so will not harm state coffers; rather our jurisdiction is precluded by the plain language of the TIA in *all* cases seeking to enjoin the levy or collection of taxes under State law. Were the case otherwise, judges might be free to become second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections. But we are not authorized by Congress to be in the business of forecasting the likely fiscal effects of variations on state tax policy; nor do we think ourselves well equipped to do so.

2. Picking up on an idea recently advanced by the Sixth Circuit, plaintiffs seek in their reply brief, and in a notice pursuant to Federal Rule of Appellate Procedure 28(j), to supplement their "fee rather than tax" and *Hibbs*-based arguments with a new, alternative contention. Now they seek to argue that Oklahoma's assessment is not a tax (or a fee) because it is a mere contractual exchange of money for a commodity. (*See* Appellant's Reply Br. at 16-19; Appellant's Supp. Auth. (filed April 10, 2006).)[13]

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13. *See, e.g.*, Appellant's Reply Br. at 16 ("Motorists' opening appellate brief explains at length why the amounts paid to purchase special plates are fees (not taxes) and are thus not implicated by the TIA. However, even if Motorists are wrong and the amounts are not fees, it does not follow that the amounts necessarily must be taxes.").

It is our general rule, however, that arguments and issues presented at such a late stage are waived. *See Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1490 (10th Cir.1995) (citing, *inter alia, Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278-79 (10th Cir.1994) (White, J.)); *accord Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 197 (D.C.Cir.1992) (declining to decide new argument that statute did not take away jurisdiction from the court, explaining that "[w]hile courts always must decline to decide cases over which they have no power, the converse of that rule does not hold: Article III tribunals are not absolutely bound to render judgment on every argument over which they obtain jurisdiction"). As we have explained, the reasons for our rule are two-fold: "First, to allow an appellant to raise new arguments at this juncture would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response.... Secondly, it would also be unfair to the court itself, which, without the benefit of a response from appellee to an appellant's late-blooming argument, would run the risk of an improvident or ill-advised opinion, given our dependence as an Article III court on the adversarial process for sharpening the issues for decision." *Headrick*, 24 F.3d at 1278 (internal quotation marks omitted).

Of course, our rule against entertaining new arguments in reply in no way precludes us from supplementing the contentions of counsel through our own efforts. *Id.* But neither does it compel us to undertake such self-directed research or pursue late and undeveloped arguments, and we exercise caution in doing so, especially in complex cases where (as here) highly competent counsel have represented the parties throughout all stages of the proceedings. Our

system of justice, after all, is not a self-directed inquisitorial one; to avoid error, we are dependent on the full development of issues through the adversarial process and the initial testing of ideas in trial courts where advocates have an opportunity to present more than thin briefs and fifteen minute oral arguments. For these reasons, we need not and do not issue any holding on plaintiffs' contractual exchange argument and leave a final decision on this score for another day.

Just how complex and difficult the new argument plaintiffs ask us to address, and thus the reason for our particular reluctance to decide it with finality, is worth pausing to underscore. Plaintiffs borrow their new submission from *ACLU of Tennessee v. Bredesen,* 441 F.3d 370, 373 (6th Cir.2006), *cert. denied* __ U.S. __, 126 S.Ct. 2972, 165 L.Ed.2d 954 (2006), a recent decision in which our sister court rejected the notion that a governmental assessment must either be a tax or a fee-the very dichotomy plaintiffs have urged courts to adopt throughout the proceedings in this circuit. (Appellant's Opening Br. at 23-28.) Rather, the Sixth Circuit held that Tennessee's statutory regime for specialty license plates "creates contractual debts to pay but imposes no tax. Instead of using its sovereign power to coerce sales, Tennessee induces willing purchases as would any ordinary market participant." *Id.* at 374.[14]

14. The Sixth Circuit itself relied in substantial part on a recent dissent from denial of rehearing *en banc* in the Fifth Circuit. *Henderson v. Stalder,* 434 F.3d 352, 353 (5th Cir.2005) (Davis, J., dissenting from denial of rehearing *en banc*). And though the Sixth Circuit overcame the TIA hurdle in its case, the end result there was no different than it is here-the Sixth Circuit still dismissed plaintiffs' claims on a motion to dismiss, albeit one directed to the merits of the constitutional claims. *Bredesen,* 441 F.3d at 375-80.

While we do not for a moment doubt that the State can obtain funds through means other than "taxes" and "fees,"[15] whether plaintiffs' assertion that Oklahoma's issuance of specialty plates amounts to nothing more than an ordinary market sales contract is far from clear. The *Bredesen* court relied on two particular factors in holding that the license plate charge was not a tax: (1) a motorist voluntarily pays the charge, and (2) the State acts as "an ordinary market participant." 441 F.3d at 374. The court noted that these two factors "apply a fortiori to ordinary purchases, like the purchase of government bonds, or the purchase of a souvenir at a state park gift store. Such purchase payments can hardly be termed 'taxes' as opposed to ordinary payments on voluntary contracts." *Id.*

But, starting with the latter consideration, we are unaware of anything approaching an "ordinary market" for specialty license plates, at least in Oklahoma. Quite unlike the (some might say over-) active market for souvenir snow globes sold in state park gift shops, the State brooks no competitors in

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15. It seems to us that *Bredesen* is absolutely right insofar as it recognized that the tax-fee dichotomy arose in a different context to answer a different question than that posed by the TIA. 441 F.3d at 374. But the dichotomy arose originally not from any circuit court opinion (as *Bredesen* suggests); instead, it seems to have originated in the Supreme Court's decision in *National Cable Television Association*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370. That case, of course, had nothing to do with the scope of the term "tax under State law" in the TIA, but was, as we have discussed, one in which the Supreme Court strained to place the FCC's authority to impose certain assessments outside the constitutional taxing power of Article I, § 8 in order to avoid what it perceived to be a potentially nettlesome non-delegation problem. *See supra* at 1247-48.

the supply of specialty license plates. As sovereign, it exercises exclusive (monopoly) power to issue those items. *See generally* 47 Okla. Stat. § 1113; *See also* Cooley, *supra,* at 72 (taxation is "the exercise of the sovereign power to raise a revenue"). Citizens cannot purchase specialty plates from some other source, affix them to the rear of their cars, and motor down the highway-at least without the substantial risk of incurring something substantially worse than either a tax or a fee.[16] From the pleadings before us, moreover, it appears that the marginal cost of specialty plates does not exceed $8 (Am.Compl.¶ 65),[17] and we know that in the competitive market for bumper stickers one can find virtually any message ready to be affixed to the back of a car for substantially less money still.[18] The fact that Oklahoma is able, under these circumstances, to charge up to $35 for a

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16. *See* 47 Okla. Stat. § 1151(A)(2) (making criminal the alteration of a license plate); *id.* § 1151(A)(5) (criminalizing the operation of a vehicle without a proper license plate or with a plate for which all taxes have not been paid).

17. "In a perfectly competitive market, retail prices drop instantly to the marginal cost of the most efficient company." *Verizon Comms., Inc. v. FCC,* 535 U.S. 467, 505, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (citing N. Gregory Mankiw, *Principles of Economics* 283-288, 312-313 (1998)).

18. For example, http:// www. stickergiant. com (last visited March 2, 2007) offers thousands of different bumper stickers, most for under $3. Stickers with slogans supporting abortion rights, such as "Pro Child Pro Choice" or "Keep Your Laws Off My Body" can be purchased for $2.99. Stickers demonstrating the opposite view, such as "It Is Not a Choice, It Is a Child," can be purchased for the same price.

specialty plate bearing a simple message calls into question whether ordinary market conditions really prevail in the sale and purchase of specialty license plates.

We are also uncertain whether the fact that the transaction to purchase specialty plates (as opposed to ordinary plates) may be "voluntary" dictates that the accompanying supracompetitive charge is not a tax. On the one hand, the prevailing definition of tax in existence at the time that the Tax Injunction Act was enacted contemplated that taxes are involuntary in nature. *See supra* at 1244-46. And, in this case, the extra charge is for a discretionary product that the state is offering, and it is purely up to the consumer to decide whether to buy it. The extra words on the specialty plate are not necessary to exercise the privilege regulated by the state-*i.e.*, driving. The basic $15 charge covers the privilege of driving, and the incremental cost may simply be a commercial price paid by a willing motorist to purchase a license plate with a slogan that is pleasing to the motorist.

On the other hand, private citizens routinely incur different levels of compulsory taxation based on the voluntary choices they make. Thus, for example, in addition to the normal taxes one pays when purchasing a new car, a higher "luxury" tax may be incurred by those buyers who choose a particularly expensive vehicle. *See, e.g.*, 26 U.S.C. § 4001(a) (1991). Those who incur this luxury tax do so "voluntarily" in the same sense that those who purchase specialty license plates bearing some preferred message do so "voluntarily." That is, just as the Cadillac owner who chooses a fancier car foresees that he or she will also have to pay an additional (compulsory) assessment to the state, a motor vehicle owner

who chooses to display a specialty plate in Oklahoma knows that he or she must pay the sovereign an additional (compulsory) sum for that privilege. The fact that the transaction in either case is voluntarily undertaken with full foresight of the inevitable (and most certainly not bargained for or voluntarily chosen) assessment makes the assessment involved no less a tax. Indeed, though our car-oriented culture may make it sometimes seem otherwise, the very decision to purchase and drive a car is itself a voluntary one (no one is forced to have a car, after all) and it, too, forseeably involves the payment of a sales tax and a tax for even a basic license plate. So it is that a very great many taxes we are every day compelled to pay are a result of our voluntary decisions (the decision to work harder this year and perhaps risk a higher income tax bracket, the decision to purchase a home rather than rent and thus incur real estate taxes, etc.). As the Fifth Circuit put the point in the process of rejecting the very analysis advanced by the plaintiffs before us in their reply brief: "Any party who pays special assessments to the government does so 'voluntarily' in order to engage in particular activity, whether that activity is homebuilding, engaging in a regulated industry or obtaining permission to park in handicapped spots." *Henderson*, 407 F.3d at 358. One thus simply cannot meaningfully distinguish taxes from "ordinary market transactions" on the basis of a taxpayer's intent. *Accord id.* (holding that it is "not the taxpayer's motivation" that distinguishes taxes from other transactions).

Appendix A

E

Having concluded that the Oklahoma specialty license plate assessments qualify as "taxes under State law," our analysis under the TIA remains still unfinished. Before declining federal jurisdiction, the statute requires us to decide whether Oklahoma affords a "plain, speedy and efficient" remedy in its courts for those seeking to challenge its taxes. 28 U.S.C. § 1341. "[I]f the state provides adequate procedural due process to allow a taxpayer to raise any constitutional objections, then the state has done all that is required under the Tax Injunction Act, and as a consequence, the federal courts are foreclosed from hearing such a tax challenge." *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1192 (10th Cir.1998) (citing *California v. Grace Brethren Church,* 457 U.S. 393, 412-13, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982)). If state courts fail to afford such due process, however, the doors to federal court remain open to ensure an adequate forum for the dispute.

We have heard no convincing reason to suppose that Oklahoma fails to provide its citizens sufficient process for challenging its tax laws; very much to the contrary. In addition to affording a general right to protest taxes before the Tax Commission, *see generally* 68 Okla. Stat. §§ 201, *et seq.*, Oklahoma has specifically created "a right of action . . . to afford a remedy to a taxpayer aggrieved by the provisions of this article or of *any other state tax law.*" 68 Okla. Stat. § 226(a) (emphasis added). The provision creates "a legal remedy and a right of action" in any case where a party claims, *inter alia,* that "the collection thereof [is] violative of any Congressional Act or provision of the Federal Constitution."

Id. § 226(c).[19] Motorists provide no reason why they cannot avail themselves of these provisions, nor do they respond to the defendants' argument that this provision ensures them a speedy, efficient, and fair hearing.

Oklahoma law also specifically provides that parties may apply for and receive injunctive and declaratory relief as against unlawful taxes, exactly the sort of relief Motorists seek here. *See* 12 Okla. Stat. § 1397 ("An injunction may be granted to enjoin the enforcement of a void judgment, the illegal levy of any tax, charge or assessment, or *the collection of any illegal tax,* charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction.") (emphasis added); *see also id.* §§ 1651-57. In their brief, Motorists purport to quote Section 1397 as allowing an injunction only with respect to "the collection [from them] of any illegal tax, charge or assessment." (Appellant's Opening Br. at 29.) With their addition of the bracketed language, Motorists argue that Section 1397 applies only to taxpayers challenging the collection of taxes levied *against them* and not to third party challenges such as the one they seek to pursue. But the statute simply does not contain the language the Motorists complain about (and themselves add), and we have been offered no reason to suppose that Oklahoma courts will interline the plain words of the statute in this fashion.

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19. That this provision also purports to allow such actions in federal court as well as state court, *see* 68 Okla. Stat. § 226(c), does not affect our jurisdictional analysis, as the Oklahoma Legislature obviously cannot usurp Congress's prerogative in expanding or contracting the scope of a federal court's jurisdiction.

Appendix A

III

In claims five and six, ORC challenges not the *collection* of any tax but the manner in which money is *distributed* from the Choose Life Assistance Program. ORC argues in these remaining claims that the State impermissibly denies it the opportunity to receive monies from the Choose Life Assistance Program based solely on its viewpoint, in violation of the First and Fourteenth Amendments. More specifically, the Choose Life Assistance Program directs monies to groups that counsel "pregnant women who are committed to placing their children for adoption." 47 Okla. Stat. § 1104.6(C)(3). ORC indicates that it would like to offer such counseling services to women and has applied for funding to do so, but that its applications have been denied due to a statutory restriction preventing the disbursement of program funds to organizations that are also "associated with any abortion activities."[20] *Id.* § 1104.6(C)(4); *see also*

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20. We identified a potential ripeness concern with counts five and six. The operative complaint states merely that "ORC *would like to* apply for funding pursuant to 47 Okla. Stat. § 1104.6," not that ORC had ever so applied. (Am. Compl. ¶ 27 (emphasis added).) Had ORC not given DHS the opportunity to consider an application for disbursement under the Choose Life Assistance Program, we would have had serious concerns about whether we were being called upon to determine a case based upon an event which may not happen at all. What if ORC did apply and DHS, if against all the odds, granted the application? At oral argument, however, both parties informed us the ORC *has* applied for funding from the Choose Life Program Fund in fiscal years 2006 and 2007, and that DHS *has* denied its applications for the very reason that forms the basis of claims five and six-that is, because ORC is associated with abortion activities. (Cont'd)

id. § 1104.6(D). ORC contends that this restriction amounts to an "unconstitutional condition" on the exercise of its First Amendment rights. Defendants respond, and the district court held, that the Eleventh Amendment immunizes them from such a claim.[21]

A

The Eleventh Amendment provides that

> [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. By its plain terms, nothing in the Amendment would appear to bar ORC's claims as they

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(Cont'd)

The parties thereafter supplemented the record before us with copies of ORC's applications and DHS's denials. We are thus satisfied that ORC's claims are indeed properly before us.

21. Certain of the defendants argue in a footnote that claims five and six are also barred by the TIA because the relief sought with respect to those claims also implicates the State's tax collection power. (Tax Commission Defendants' Resp. Br. at 44 n. 12.) We will not consider an argument raised in such a perfunctory manner. *See United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir.2002); *accord Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1122 (10th Cir.2004) (issue raised only in footnote before trial court deemed waived).

involve purely an intrastate matter-ORC claims to be a non-profit organization located in Oklahoma (Am.Compl. ¶¶ 20-21), and it seeks to sue only its own sovereign state. But the plain terms of the Amendment have been much embroidered. The Supreme Court in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), long ago instructed inferior federal courts that the Amendment should be read to preclude even suits by a citizen against its own sovereign state; " 'inherent in the nature of sovereignty,' " *Hans* held, " 'is the right not to be amenable to the suit of an individual without its consent.' " *Id.* at 13, 10 S.Ct. 504 (quoting *The Federalist No. 81*, at 547 (Alexander Hamilton) (Carl Van Doren ed.1979)). Though the Court has sometimes criticized *Hans* and more than once considered overruling it,[22] *Hans* remains the law.

The Supreme Court has, however, issued a series of rulings limiting *Hans*'s reach. Perhaps the most significant, and the one most relevant for our purposes, is *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In *Ex parte Young*, the Court held that the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only

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22. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31-35, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (Scalia, J., concurring and dissenting); *Welch v. Tex. Dep't of Highways & Public Transp.*, 483 U.S. 468, 495-96, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (Scalia, J., concurring); *id.*, at 519-21, 107 S.Ct. 2941 (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 298-302, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (Brennan, J., dissenting). *See also* Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1694 n. 42 (1997) (collecting scholarly criticism of *Hans*).

declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself. *Young's* effort to alleviate the effect of *Hans,* however, itself contains some logical curiosities of its own. *Young* proceeds on the admitted fiction that a suit seeking an injunction against a state employee seeking to do his or her job is (somehow) different in substance than a suit against the state itself. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 105, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (noting the "fiction of *Young*").[23] It also proceeds on the related assumption that the state employee is somehow engaging in something other than state action for purposes of the Eleventh Amendment yet is engaging in sufficient state action for purposes of the Fourteenth Amendment to provide us with jurisdiction; after all, we can enforce a constitutional right only as against state, not private, action. *See id.; Virginia v. Rives,* 100 U.S. 313, 318, 25 L.Ed. 667 (1879). *Young* further commands us to afford federal jurisdiction to federal claims even when a competent state forum stands ready and able to adjudicate those claims; indeed, the presence or absence of a state forum simply does not enter into the *Young* equation.[24]

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23. *See also* Kenneth C. Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 U. Chi. L.Rev. 435 (1962) ("You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.").

24. *But see Young,* 209 U.S. at 176, 28 S.Ct. 441 (Harlan.J., (Cont'd)

Appendix A

Adding to the rococo quality of Eleventh Amendment jurisprudence, the Supreme Court has in recent years added a new gloss on *Young's* gloss on *Hans's* gloss on the Eleventh Amendment. First, in 1996, the Court held that *Young* suits are not available where Congress "has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 74, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). That is, "federal courts are not free to imply the wide-ranging, judge-made remedial doctrine of *Ex parte Young* when Congress has seen fit to craft a significantly narrower statutory remedy." *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1189 (10th Cir.1998). A year later, the Court instructed that *Young* may not be rotely applied; instead, lower courts "must ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law." *Coeur d'Alene,* 521 U.S. at 269, 117 S.Ct. 2028. The Court added that

> [t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective

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(Cont'd)

dissenting) (criticizing majority for failing to recognize that "[w]e must assume-a decent respect for the states requires us to assume-that the state courts will enforce every right secured by the Constitution"); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 270-74, 117 S.Ct. 2028, 138 L.Ed.2d 438 (Kennedy, J.) (arguing that *Young* has special significance where no state forum available); *id.* at 276, 117 S.Ct. 2028 ("It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous to the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.").

> declaratory and injunctive relief is sought against an officer, named in his official capacity, would be to adhere to an empty formalism and to undermine the principle ... that the Eleventh Amendment represents a real limitation on a federal court's federal-question jurisdiction.

Id. at 270, 117 S.Ct. 2028. As the Court put it, the "real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." *Id.; see also Alden v. Maine*, 527 U.S. 706, 756-57, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

In the suit before us, defendants do not dispute that claims five and six meet the *Ex parte Young* formalisms-that is, those claims seek prospective relief, no damages, and are directed (at least nominally) against state officials rather than the State of Oklahoma itself. Instead, defendants urge us to dismiss this suit on the basis of the new gloss added to *Young* by *Coeur d'Alene*. But this only raises the questions: What exactly did *Coeur d'Alene* do to the state of the Supreme Court's *Ex parte Young* jurisprudence?[25] And what does *Coeur d'Alene* mean for this case?

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25. As one critic has put it, "The most unsettled aspect of the newly developing law [regarding the Eleventh Amendment] is the effect of *Coeur d'Alene Tribe*." John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. Marshall L.Rev. 1, 4 (2001); *see also* Laurence H. Tribe, *American Constitutional Law* 566 (3d ed. 2000) ("The meaning of ... *Coeur d'Alene* for *Ex parte Young* is a matter of great debate among commentators.") (collecting articles); Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, (Cont'd)

Appendix A

Coeur d'Alene involved multiple and fractured opinions. Justice Kennedy wrote the lead opinion but commanded a majority with respect only to certain sections. When it came to the key question how lower courts should change their analyses under *Ex parte Young*, Justice Kennedy wrote for just himself and Chief Justice Rehnquist to suggest a "case-by-case approach" in which lower courts should "reflect a sensitivity" to a "broad" range of questions ranging from the nature and significance of the federal rights at stake, the state interests implicated by the lawsuit, and the availability of a state forum. 521 U.S. at 280, 117 S.Ct. 2028. Federalism and comity interests, Justice Kennedy wrote, should receive consideration in every case. *Id.* at 278-280, 117 S.Ct. 2028. Turning to the specific matter before him, in which the Coeur d'Alene Tribe of Idaho sought a declaratory judgment action to establish its entitlement to exclusive use and occupancy of submerged lands under Lake Coeur d'Alene, Justice Kennedy wrote that the lawsuit sought to "divest the State of its sovereign control over submerged lands, land with a unique status in the law and infused with a public trust the State itself is bound to respect." *Id.* at 283, 117 S.Ct. 2028. After balancing the competing federal and state interests at stake, and acknowledging the ready availability of a state forum to hear the dispute, Justice Kennedy concluded that "[t]he dignity and status of its statehood allow[ed] Idaho to rely on its Eleventh Amendment immunity and to insist upon

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Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 Geo. L.J. 1, 42 (1998) ("Exactly what the Court held [in *Coeur d'Alene*], and thus how radically it changed [Eleventh Amendment] doctrine, is a matter of some dispute.") (hereinafter "Vázquez").

responding to these claims in its own courts." *Id.* at 287-88, 117 S.Ct. 2028.

Justice O'Connor wrote separately for herself and Justices Scalia and Thomas to express disagreement with this "reformulation" of *Ex parte Young*. *See* 521 U.S. at 296, 117 S.Ct. 2028. Justice O'Connor worried that Justice Kennedy's approach would replace "a straightforward inquiry" under *Ex parte Young* with a "vague balancing test that purports to account for a 'broad' range of unspecified factors." *Id.* And, as with the balancing of federal and state interests, Justice O'Connor appeared to reject the notion that the availability (or unavailability) of a state forum should play any role in our Eleventh Amendment analysis under *Young*. *Id.* at 292, 117 S.Ct. 2028; *see also supra* at note 24. Yet, Justice O'Connor joined Justice Kennedy in holding that the plaintiff's suit should be dismissed despite its seeming compliance with *Ex parte Young's* formalisms. Her precise reason for doing so, however, is not free from dispute.[26] It appears that Justice O'Connor modified *Ex parte Young* slightly by expanding what constitutes impermissible retrospective relief. Though the Tribe's claim was *formally* pled as an action for declaratory and injunctive relief, Justice O'Connor noted that its request for a declaration that the State did not own the submerged lands at issue was really, in

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26. *See* Vázquez, *supra* note 25; Eric B. Wolff, Coeur d'Alene *and Existential Categories for Sovereign Immunity Cases*, 86 Cal. L.Rev. 879, 916 (1998) (discussing Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L.Rev. 867 (1969), and Louis L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 Harv. L.Rev. 1 (1963)).

substance, tantamount to a request to transfer title over huge tracts of lands, a form of relief much akin to a (significant) retroactive monetary judgment and not at all like a run of the mill *Ex parte Young* suit seeking to bar the future implementation of regulations issued by a state regulatory body. *Id.* at 291, 117 S.Ct. 2028.[27] Thus, Justice O'Connor seemed to suggest that we must assess whether a claim seeks relief effectively equivalent to a retrospective judgment regardless of how it is formally pled or denominated.

B

As the narrower approach commanding the fifth vote, we have previously acknowledged that Justice O'Connor's opinion provides the controlling guidance for lower courts and sought to apply that approach, as best we understood it, in *ANR Pipeline*, 150 F.3d at 1190. There, we wrote that "[i]n light of *Coeur d'Alene Tribe*, federal courts must examine whether the relief being sought against a state official 'implicates special sovereignty interests.' If so, we must then determine whether that requested relief is the 'functional equivalent' to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment," such as a retrospective money judgment. *Id.*

After our decision in *ANR Pipeline*, however, the Supreme Court in *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635, 122 S.Ct. 1753, 152

27. *Ex parte Young*, like many suits in which the doctrine it set forth has been applied, involved a suit against state officers seeking to enjoin enforcement of a utility commission order that allegedly violated federal law. 209 U.S. at 129, 28 S.Ct. 441.

L.Ed.2d 871 (2002), had occasion to return to this area. There, the Supreme Court reviewed a Fourth Circuit decision articulating an approach to sovereign immunity that closely tracked our approach in *ANR Pipeline:*

> [T]o determine whether *Ex parte Young* authorizes this suit against State officials, we must evaluate the federal interests served by permitting a federal suit against individual members of the Maryland Public Service Commission, taking into account the remedial scheme for enforcement of federal law that Congress has established in the Telecommunications Act of 1996. Then, with those federal interests understood, we must determine whether the federal suit would unduly sacrifice the important value of Maryland's sovereign immunity.

Bell Atlantic Md. v. MCI Worldcom Inc., 240 F.3d 279, 295 (4th Cir.2001), *rev'd by Verizon Md.*, 535 U.S. at 648, 122 S.Ct. 1753.

The Supreme Court reversed. In doing so, a clear majority of the Supreme Court followed Justice O'Connor's approach in *Coeur d'Alene* and instructed lower courts definitively that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' " *Verizon Md.*, 535 U.S. at 645, 122 S.Ct. 1753 (quoting *Coeur d'Alene*, 521 U.S. at 296, 117 S.Ct. 2028

(O'Connor, J., concurring)). Emphasizing the importance of the adverb "properly" and that formal pleading titles do not necessarily control, the Court explained that, in the case before it, "no past liability of the State, or of any of its commissioners, is at issue. [The lawsuit] does not impose *upon the State* a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.... Insofar as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction." *Id.* at 646, 122 S.Ct. 1753 (internal citations and quotation marks omitted).

The Supreme Court's formulation of *Coeur d'Alene* in *Verizon Maryland* is thus somewhat different from what we had understood it to be in *ANR Pipeline.* In rejecting the Fourth Circuit's analysis, the Supreme Court in *Verizon Maryland* clarified that the courts of appeals need not (and should not) linger over the question whether "special" or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought. Thus, to the extent that our decision in *ANR Pipeline* read *Coeur d'Alene* as requiring "federal courts [to] examine whether the relief sought against a state official 'implicates special sovereignty interests,' " 150 F.3d at 1190, we recognize today that *Verizon Maryland* abrogated this step. Instead, the Supreme Court has instructed that we are to proceed immediately in every case to the "straightforward [or so one might hope] inquiry" whether the relief requested is "properly" characterized as prospective or is indeed the functional equivalent of impermissible retrospective relief. *Verizon Md.*, 535 U.S. at 645, 122 S.Ct. 1753; *see also Republic of Paraguay v. Al. n,* 134 F.3d 622, 628-29 (4th Cir.1998) (reading *Coeur d'Alene* as requiring

lower courts to analyze whether relief sought is the " 'functional equivalent' " of retrospective relief "notwithstanding [the fact that the] claimed violation was continuing and the relief sought was only prospective in nature").

Following the Supreme Court's most recent and definitive guidance in *Verizon Maryland,* the sole question for us becomes whether the relief sought by ORC is prospective, not just in how it is captioned but also in its substance. The State appears to wish the law were otherwise, pursuing arguments that track to a significant degree the sort of case-specific analysis of the state interests at stake that the Fourth Circuit pursued in *Verizon Maryland.* But we are bound by the law as it is, not as one might wish it to be. And *Verizon Maryland* has done much to make clear(er) the law that binds us.

With the dismissal of claims one through four, the only remaining relief sought by ORC relates to the statutory provisions prohibiting disbursement to organizations which engage in abortion-related activities, that is 47 Okla. Stat. § 1104.6(C)(4) and (D). Specifically, ORC seeks (i) a declaration that prohibiting the distribution of monies from the Choose Life Assistance Program based on abortion-related speech is unconstitutional; (ii) an injunction to stop the Defendants from enforcing 47 Okla. Stat. § 1104.6(C)(4) and (D), which prohibit distribution to such organizations; and (iii) severance of those subsections from the rest of the statute. (Am.Compl.¶ 166.) By its terms, ORC's complaint does not seek a money judgment for any past alleged infractions of federal law. Neither does it seek to impose

any constraints on the State's ability to decide which specialty license plates to allow or disallow. Nor does it seek to dictate which programs the State may choose (or not choose) to fund with revenues from its specialty license plate scheme. Nothing in ORC's suit calls to mind the sort of literal land grab effort made by the plaintiffs in *Coeur d'Alene* with its consequent significant implications on the state fisc.[28] Viewing the facts in the light most favorable to ORC, we are unable to conclude that, were ORC to prevail, Oklahoma's specialty license plate program would be any less financially lucrative for the State, or that the State would be inhibited in any of its funding options, including its decision to collect and spend revenues in aid of adoption activities through the Choose Life Assistance Program. Instead, akin to *Ex parte Young* and *Verizon Maryland*, ORC's injunction claim seeks to preclude only the future enforcement of one aspect of a complex regulatory scheme, and its claim for declaratory relief adds nothing of substance to this request. *See Verizon Md.*, 535 U.S. at 645, 122 S.Ct. 1753 ("We have approved injunction suits against state regulatory commissioners [under *Young*] . . . . Indeed, *Ex parte Young* itself was a suit against state officials . . . to enjoin enforcement of a railroad

28. Lower courts that have found *Coeur d'Alene* applicable have involved just such circumstances. *See, e.g., Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2d Cir.2004) (claiming that the State of New York was wrongfully in possession of 10 counties); *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir.2000) (seeking to eject state officers from piece of real property); *MacDonald v. Vill. of Northport, Mich.*, 164 F.3d 964 (6th Cir.1999) (seeking declaration that right-of-way that provided access to navigable waterway was the lawful property of plaintiffs).

commission's order requiring a reduction in rates.").[29] That is, ORC's complaint seeks only to prohibit the State in the future from denying Choose Life Assistance Program funds to organizations like ORC because they also advocate abortion. According to ORC, Oklahoma imposes a so-called "unconstitutional condition" insofar as the State allegedly provides no way for ORC to receive such funding to support its adoption counseling services and still exercise its First Amendment right to speak out about abortion, even using entirely private funds in entirely distinct programs. To participate in the State's Choose Life Assistance Program, ORC contends it effectively must give up its constitutionally protected right to advocate for abortion even on its own proverbial time and using its own (non-governmental) funds.[30]

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29. This stands in contrast to the situation we faced in *ANR Pipeline*. Had we allowed the suit to go forward in *ANR Pipeline*, a federal court would have been in the position of effectively rewriting a not insignificant portion of Kansas's property tax code. *ANR Pipeline*, 150 F.3d at 1194.

30. As the Supreme Court explained in *Rust v. Sullivan*, the problem of unconstitutional conditions arise in cases where "the Government has placed a condition on the *recipient* of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the [constitutionally] protected conduct outside the scope of the [government-]funded program." 500 U.S. 173, 197, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (emphasis in original). Thus, in one early application of the doctrine, the Court struck down a California law which required persons to swear an oath that they did not advocate for the overthrow of the government of the United States or the State of California in order

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Of course, had ORC's complaint gone further—seeking, for example, to require the State to fund its abortion-related programs—we would have faced a very different and considerably more difficult question under *Coeur d'Alene* and *Verizon Maryland*.[31] But in this case, even if ORC were to prevail and obtain the relief sought in its amended complaint, the State would remain free to promote adoption and ensure that none of its monies go to abortion-related activities or any other activities of which it disapproves.[32] Indeed, ORC agreed at oral argument that the Supreme Court's ruling in *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), allows the State to make a

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to receive a tax exemption. *Speiser v. Randall*, 357 U.S. 513, 516, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). In doing so, the Court held that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech," which "necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 518, 519, 78 S.Ct. 1332. The Court added that "when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Id.* at 528-29, 78 S.Ct. 1332.

31. *See, e.g., Barton v. Summers*, 293 F.3d 944, 951 (6th Cir.2002) (holding that an attempt to force the State to make a particular allocation of Medicaid funds despite congressional authorization allowing the State considerable discretion amounted to an effort to obtain money damages impermissible under *Coeur d'Alene*).

32. Given the 2005 amendments, however, it now appears that Oklahoma law might permit a license plate expressing support for- and even funding-abortion-related activities. *See supra* at 1241.

choice to support adoption rather than abortion-related programs.[33] ORC further acknowledged that it would be entirely permissible for Oklahoma, consistent with the regime approved by the Supreme Court in *Rust*, to require private organizations (like ORC) that support both adoption and abortion to create a structurally separate affiliate that does not engage in abortion activities to receive and account for governmental funds in order to ensure that public monies are in no way intermingled with privately raised funds used for the group's separate abortion-related activities. *Cf. Harris v. Owens*, 264 F.3d 1282, 1293 (10th Cir.2001) (holding that suit to obtain share of funds from tobacco settlement would not impermissibly intrude on state's interest in shaping law-enforcement remedies where "[t]he state and the tobacco companies have already determined how much money will be paid to the state; Harris merely seeks his portion (if any) of these funds").[34]

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33. *See Rust*, 500 U.S. at 198-99, 111 S.Ct. 1759 (upholding government's right to issue regulations which required recipients of grants to engage in abortion-related activity separately from activity receiving federal funding); *see also Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (holding that Congress could exercise its spending power to prohibit tax-exempt organizations from lobbying because organizations were free to create separate affiliates which could receive private funds to support lobbying efforts); *accord United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) (declining to decide unconstitutional conditions argument but reiterating *Rust's* teaching that government may insist that public funds be spent for purposes for which they were authorized).

34. In *Rust*, the governmental regulations at issue did "not force the . . . grantee to give up abortion-related speech; they merely

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Given all this, we are unable to conclude, as defendants would have us, that the relief ORC seeks represents an impermissible form of relief under our received Eleventh Amendment jurisprudence. Of course, at this stage we are confronted only with a motion to dismiss and thus have taken plaintiff's pleadings as true for purposes of our analysis, drawing all inferences in ORC's favor. We offer no comment on whether the ORC will ultimately be able to prove that Oklahoma's statutory scheme is constitutionally infirm. *See Verizon Md.*, 535 U.S. at 646, 122 S.Ct. 1753 ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."). And, as with any other legal defense or immunity, should the facts developed in discovery take the case in a direction different from that suggested by the complaint, the trial court remains free to revisit the applicability of the Eleventh Amendment, whether at summary judgment or thereafter. That is, defendants remain free, as discovery progresses, to try to establish facts suggesting that granting ORC the relief it requests would operate to reduce the amount of funds flowing to the state Treasury or otherwise constitute something functionally equivalent to a retrospective judgment. Likewise, we offer no comment on whether any other forms of relief ORC may ultimately seek to add to this suit might

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require[d] that grantee to keep such activities separate and distinct from its [government-funded family planning activities]" such that "the ... *grantee* [could] continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; [the grantee was] simply required to conduct those activities through programs that are separate and independent from the project that receives [government] funds." 500 U.S. at 196, 111 S.Ct. 1759.

or might not be problematic under the Eleventh Amendment. For our current purposes, we need only conclude, as we do, that litigation may proceed on the basis of plaintiffs' amended complaint.[35]

IV

For the reasons explored above, we hold that Oklahoma's specialty license plate charges are "taxes under State law" for the purposes of the TIA and thus affirm the district court's dismissal of claims one through four. We also hold that the prospective relief sought in this case falls within the scope of *Ex parte Young* and is not barred by the Eleventh Amendment; we therefore reverse the district court's dismissal of claims five and six and remand those claims for further proceedings consistent with this opinion. *So ordered.*

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35. On November 12, 2004, the district court entered a Temporary Restraining Order prohibiting the State from disbursing any monies from the Choose Life Assistance Fund until July 1, 2005. On July 6, 2005, the parties entered into an Agreed Order pursuant to which the State promised to retain ORC's *pro rata* share of the funds available for distribution from the Choose Life Assistance Fund until the case has been decided on the merits. We need not decide-and express no views on—whether any disbursement of these funds would be the functional equivalent to an impermissible retroactive money judgment because no party to this appeal challenged the Agreed Order. All that is now before us is a motion to dismiss the complaint based on the allegations contained therein.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AUGUST 16, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 04-CV-0028-CVE-PJC

HAROLD E. HILL, et al.,

Plaintiffs,

v.

THOMAS E. KEMP, et al.,

Defendants.

OPINION AND ORDER

Now before the Court are the motions to dismiss (Dkt. ## 46, 47, 50, and 51) filed by defendants Howard H. Hendrick, in his official capacity as Director of the Oklahoma Department of Human Services; Thomas E. Kemp, Jerry Johnson, and Connie Irby, in their official capacities as Chairman, Vice-Chairman, and Secretary-Member of the Oklahoma Tax Commission; Brad Henry, in his official capacity as Governor of the State of Oklahoma; W. Drew Edmondson, in his official capacity as Attorney General of the State of Oklahoma; and Scott Meacham, in his official

capacity as Treasurer of and for the State of Oklahoma,[1] as to all claims brought against them by plaintiffs in this case. Plaintiffs Harold E. Hill, Margaret R. and William F. McCright, John J. McQueen, Rita J. Moskowitz, and Barbara Santee (collectively, "Motorist Plaintiffs"), and Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC") challenge the constitutionality of certain Oklahoma statutes relating to the issuance of specialty license plates and seek declaratory and injunctive relief under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments to the United States Constitution. Specifically, the Motorist Plaintiffs complain that certain statutes authorizing the issuance of specialty license plates, including those displaying the phrases "Choose Life" or "Adoption Creates Families," infringe their exercise of free speech and the protections accorded by the Due Process and Equal Protection Clauses of the Constitution. ORC further challenges the statutory eligibility requirements for programs desiring to receive funds under the Choose Life Assistance Program which is funded through the specialty plates program.

I.

Through Okla Stat. tit. 47, §§ 1135.1-1135.6, the Oklahoma legislature has created a process by which the Oklahoma Tax Commission ("OTC") may issue Oklahoma

1. Robert Butkin held the office of Treasurer at the time the lawsuit was filed and thus was named in the original Complaint (Dkt. # 1) and First Amended Complaint (Dkt. #45). The office of Treasurer of and for the State of Oklahoma is now held by Scott Meacham. Because defendant Butkin was sued in his official capacity, Scott Meacham is automatically substituted as party defendant pursuant to Fed. R. Civ. P. 25(d)(1). The caption shall be amended accordingly.

motorists, for an additional payment, any of nearly 100 specialty license plates, including the two at issue here. New specialty license plates — not already authorized by the legislature — may be created ultimately only by legislative amendment.

Of the additional $35 amount paid for the Choose Life plates, eight dollars is deposited into the OTC Reimbursement Fund, $20 is deposited into the Choose Life Assistance Program Revolving Fund ("Choose Life Fund"), and the remaining seven dollars is apportioned among the various school districts, the state's General Revenue Fund, the State Transportation Fund, the counties, cities, and incorporated towns of the State of Oklahoma, and the Law Enforcement Retirement Fund pursuant to Okla. Stat. tit. 47, § 1104. Okla. Stat. tit. 47, § 1135.5(C). The legislature has also established the eligibility criteria for receiving monies from the Choose Life Fund. Okla Stat. tit. 47, § 1104.6. Of the additional $35 amount paid by Oklahoma motorists for the Adoption Creates Families plate, eight dollars is deposited into the OTC Reimbursement Fund, $25 is deposited into a revolving fund to be used by the Department of Human Services "for the implementation of the Investing in Stronger Oklahoma Families Act specifically for created families," Okla Stat. tit. 47, § 1135.5(B)(22), and the remaining two dollars is apportioned pursuant to Okla. Stat. tit. 47, § 1104. Okla. Stat. tit. 47, § 1135.5(C).

Motorist Plaintiffs allege that they each own automobiles validly registered in the State of Oklahoma, and each seeks a specialty license plate expressing support for choice in family planning. Each went to a local tag agency within the

Northern District of Oklahoma and specifically asked to purchase a special license plate expressing support for choice in family planning, but were notified that no such plate exists in Oklahoma. Motorist Plaintiffs assert that over two years ago, the Oklahoma Reproductive Health Coalition, of which plaintiffs Santee and ORC were members, sought passage of an amendment which would have authorized the issuance of such a plate. They further assert that the bill containing this amendment was referred to the Senate Finance Committee on February 4, 2003, but failed to be passed during the first or second regular session after its introduction, and therefore officially died on May 28, 2004.

ORC, which is located in Tulsa, Oklahoma, is a statewide coalition of religious organizations. Its mission is to support a woman's freedom of reproductive choice regardless of her income, culture, race, class, or ethnic origin. It provides various services to women, including both adoption and abortion counseling. Its abortion counseling activities disqualify it for receipt of funds from the Choose Life Fund under Okla. Stat. tit. 47, §§ 1104.6(C)(4) and (D). It alleges that it has applied for such funds but been disqualified on this ground.

Plaintiffs seek a declaration that the statutory scheme underlying the specialty license plates at issue in this case is unconstitutional, and an injunction against any further implementation or enforcement of the entire specialty license plate program. In the alternative, Motorist Plaintiffs seek a declaration that the practice of allowing a specialty plate expressing one view but not another is unconstitutional, and an injunction against the continued enforcement of the

legislation implementing the Choose Life and Adoptions Create Families plates specifically. ORC seeks a declaration that conditioning the receipt of government funds on abstention from certain speech is unconstitutional, and an injunction against the enforcement of Okla. Stat. tit. 47, §§ 1104.6(C)(4) and (D).

Defendants seek to have the claims against them dismissed on the grounds, *inter alia*, that the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), deprives the federal courts of jurisdiction over these claims and that they have immunity from suit under the Eleventh Amendment.[2]

II.

The Court must first address any challenge to its jurisdiction. Defendants Kemp, Johnson, and Irby contend that the TIA bars the suit in its entirety. The TIA prohibits federal courts from "enjoining, suspending, or restraining the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such state."[3] 28 U.S.C. § 1341. Plaintiffs in

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2. Defendants have also raised questions of venue, standing, and ripeness, but because the Court lacks jurisdiction, it does not reach those issues. ORC does not challenge any funding restrictions associated with the Adoption Creates Families plate.

3. The TIA would not serve to deprive federal courts of jurisdiction if *Hibbs v. Winn*, 542 U.S. 2288 (2004), can be read to encompass a suit such as this, where the requested relief would diminish the flow of state revenues. In *Hibbs*, plaintiffs were attacking a tax credit so that the impact of their winning the suit

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this case have asked the Court to enjoin the collection of certain assessments prescribed by state law related to specialty license plates, as well as to enjoin the enforcement of certain laws disbursing the funds so collected. Although the TIA is not a bar to jurisdiction over the claims related to disbursement, it may be a bar to jurisdiction over any challenge to the collection of the assessments. Accordingly the Court must first determine whether the extra amounts charged for specialty plates constitute taxes, for the purposes of the statute, or whether they are merely regulatory fees.

A.

Whether a state assessment is a tax or a regulatory fee, for the purposes of the TIA, is a question of federal law. *Marcus v. Kansas, Department of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999). The label given by a state is not dispositive of the issue of whether an assessment or other charge is a tax for the purposes of the Act. *Id.* "The critical inquiry focuses on the purpose of the assessment and the ultimate use of the funds." *Id.* The Tenth Circuit has adopted

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would have been to return money to the state treasury rather than to take it away. The Court found the TIA did not bar federal court jurisdiction. *Id.* The *Hibbs* exception to the TIA applies only where (1) a third party (not a tax payer) files suit, and (2) the suit's successes will enrich, not deplete, the government entity's coffers. *Id.* at 2288-90; *see also Henderson v. Stalder*, 407 F.3d 351, 359 (5th Cir. 2005). Therefore, although Motorist Plaintiffs' claims meet the first prong for this exception, an injunction against the license plate program's operation would reduce state revenues and thus fails to meet the second prong.

the distinction between taxes and fees laid out by the Fifth Circuit:

> The classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

Marcus, 170 F.3d at 1311 (quoting *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir. 1998)); *see also Henderson*, 407 F.3d at 356. The Fourth Circuit has further clarified that "[a] tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue 'to a general fund, and [is] spent for the benefit of the entire community,' [while a] user fee . . . is a 'payment[ ] given in return for a government provided benefit' and is tied in some fashion to the payor's use of the service." *Marcus*, 170 F.3d at 1311 (quoting *Folio v. City of Clarksburg, W. Va.*, 134 F.3d 1211, 1217 (4th Cir. 1998)); *see also Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (characterizing fees as charges imposed "(1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes").

Appendix B

Here, first, although the fees for Oklahoma specialty plates are collected by the OTC, they are set directly by the legislature. Second, although the extra assessments for specialty license plates are paid only by a subset of license plate purchasers as would support the argument that the charges are imposed "only upon those [the scheme] regulates" and therefore constitute fees, all but eight dollars of each $35 assessment is used to benefit the community as a whole. That $27 of each $35 assessment is completely unrelated to the administration of motor vehicle licensing and registration law underscores the revenue raising purpose of the statutory scheme. The argument that revenue from the specialty plate assessments does not serve the general community welfare because it is earmarked for specially eligible recipient organizations is unpersuasive because the appropriate focus is not upon where the funds are eventually deposited, but upon the purpose of the assessment and upon the eventual use to which the funds are put. The Oklahoma legislature designated that the specialty license plate assessments (above the $8 handling charge) be used for a wide range of purposes, including education, wildlife conservation, and state, city, and county road and highway maintenance, as well as, in the case of these two particular plates, adoption support. None of these purposes is regulatory as to the purchasers of specialty plates, and although plaintiffs' view of the public benefit served by these expenditures might differ from that of the Oklahoma legislature, it does not transform the extra assessments into fees.

Plaintiffs cite *Marcus* for the proposition that "special license plate fees did not constitute a tax for the purposes of the Tax Injunction Act." Plaintiffs' Response (Dkt. # 56) at

14. However, although the Tenth Circuit in *Marcus* ultimately found the extra assessment for disabled parking placards to be a regulatory fee rather than a tax, the purpose and ultimate use of that assessment is easily distinguished from the purpose and use of the extra assessments in this matter. The Kansas statutory scheme under consideration in *Marcus* expressly provided that the assessment be used primarily to cover the administration costs of the motor vehicle registration laws. *Id.* at 1311. Here, of the additional $35 assessment at issue in the case of the Choose Life plate, only $8 is being used to pay expenses incidental to administering motor vehicle laws. The majority ($20) is a legislatively designated amount, contributed to a legislatively established fund created to assist organizations that provide services to pregnant women committed to placing their children for adoption. Okla. Stat. tit. 47, §§ 1135.5(B)(23) and 1135.5(C). The legislature even established the eligibility criteria for receiving monies from the Choose Life Fund. Okla Stat. tit 47, § 1104.6. The remainder goes into legislatively established general funds, clearly unrelated to the administration of motor vehicle registration laws.

Similarly, the majority of the additional amount paid by Oklahoma motorists for the Adoption Creates Families plate is required, by statute, to be deposited into a revolving fund to be used by the Department of Human Services "for the implementation of the Investing in Stronger Oklahoma Families Act specifically for created families." Okla Stat. tit. 47, § 1136.81.

Even though eight dollars of each $35 extra assessment is apportioned to the OTC for the administration of motor

vehicle registration laws, and is therefore regulatory in nature, the vast majority of each assessment goes either to a specially-legislated fund unrelated to motor vehicle registration or is distributed among legislatively established general funds unrelated to motor vehicle laws. Accordingly, the Court finds that the amounts collected for the specialty plates in this case are taxes rather than regulatory fees.

B.

Because the Court has found the assessments at issue to constitute taxes rather than regulatory fees, it must now turn to the question of whether a "plain, speedy and efficient remedy may be had" in Oklahoma courts. 28 U.S.C. § 1341. "The Supreme Court has specifically held that the words 'plain, speedy and efficient remedy' are to be given a purely procedural interpretation. A state remedy is adequate if it meets 'certain minimal procedural criteria,' which include an opportunity to raise the desired legal objections with the eventual possibility of Supreme Court review of that claim." *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986) (citing *Carrier Corp. v. Perez*, 677 F.2d 162, 165-66 (1st Cir.1982) (quoting *Roswell v. LaSalle National Bank*, 450 U.S. 503, 514 (1981) (upholding state court refund procedure because it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax")).

The Tenth Circuit has held that, for purposes of section 1341, Oklahoma provides an adequate remedy to challenge the lawfulness of its taxing policies and practices. *Brooks*, 801 F.2d at 1240 (citing *Cities Service Gas Co. v. Oklahoma*

Tax Commission, 656 F.2d 584, 587-88 (10th Cir. 1981), and *Bunte Candies, Inc. v. Cartwright*, 508 F. Supp. 229, 236 (W.D. Okla.1981)). Taxpayers may apply for a hearing before the OTC to challenge any incorrect assessment of taxes. Okla. Stat. tit. 68, § 207(c). Decisions of the OTC may be appealed directly to the Supreme Court of Oklahoma. Okla. Stat. tit 68, § 225(A). Alternatively, a taxpayer may pay the disputed tax and institute an action in any state court having jurisdiction over the parties and the subject matter. Okla. Stat. tit. 68, § 226. Taxpayers also have the option of applying for injunctive and declaratory relief in the Oklahoma state courts. Okla. Stat. tit. 12, §§ 1397, 1651-1657. Moreover, federal civil rights claims may be brought in the state court system. *See, e.g., Willbourn v. City of Tulsa*, 721 P.2d 803, 805 (Okla. 1986) (section 1983 available in state court even though state remedy time-barred). For these reasons, the Court finds that Motorist Plaintiffs have a plain, speedy, and efficient remedy in the state courts similar to that sought here.

Because the assessments at issue are taxes, and a plain, speedy, and efficient remedy may be had in Oklahoma courts for any rights violation caused by the imposition of such taxes, the TIA bars this Court's jurisdiction over any claims related to the portion of the statutory scheme that authorizes the issuance of the specialty plates. This jurisdictional bar applies with respect to all plaintiffs. For these reasons, the first, second, third, and fourth claims for relief of plaintiffs' First Amended Complaint (Dkt. # 45) must be **dismissed**. Because the fifth and sixth claims for relief involve the disbursement of funds rather than the collection of funds, the Court finds that the TIA does not bar the Court's jurisdiction as to them.

Appendix B

III.

As to the remaining claims, defendants also argue that they have immunity from suit under the Eleventh Amendment. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

The United States Supreme Court has interpreted the Eleventh Amendment to apply to federal question suits against a state brought by its own citizens. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997). There are exceptions to Eleventh Amendment immunity, but plaintiffs rely instead on the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908). "Although citizens may not generally sue states in federal court under the Eleventh Amendment, the *Ex parte Young* doctrine has carved out an alternative, permitting citizens to seek prospective equitable relief for violations of federal law committed by state officials in their official capacities." *Lewis v. New Mexico Dep't of Health*, 261 F.3d 970, 975 (10th Cir. 2001) (citing *Ex parte Young*, 209 U.S. at 159-60).

The Tenth Circuit has outlined a four-part test for application of the *Ex parte Young* exception: (1) the plaintiff is suing state officials, with an enforcement connection to the challenged statute, rather than the state itself; (2) the plaintiff has alleged a non-frivolous violation of federal law;

(3) the plaintiff seeks prospective equitable relief, rather than retroactive monetary relief from the state treasury; and (4) the suit does not implicate "special sovereignty interests." *Harris v. Owens*, 264 F.3d 1282, 1290-94 (10th Cir. 2001); *Elephant Butte Irrigation Dist. of N. M. v. Dep't of the Interior*, 160 F.3d 602, 609 (10th Cir. 1999). In this case, plaintiffs have alleged a non-frivolous violation of their constitutional right to free speech under the First and Fourteenth Amendments. The Tenth Circuit has clarified that a court assessing this factor "need only determine whether Plaintiffs state a non-frivolous, substantial claim for relief against state officials that does not merely allege a violation of federal law 'solely for the purpose of obtaining jurisdiction,'" and that the inquiry does not go to the merits of plaintiffs' claim. *Elephant Butte*, 160 F.3d at 610 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 n.10 (1949)); *see also Harris*, 264 F.3d at 1289. Also, plaintiffs seek prospective equitable relief: specifically, injunctive relief prohibiting defendants from enforcing certain Oklahoma statutes that they assert unconstitutionally restrict their speech. Thus, there remain two issues: (1) whether the state officials named as defendants have a sufficient enforcement connection with the challenged statutes to invoke the *Ex parte Young* exception; and (2) whether any "special sovereignty interest" is implicated by ORC's claims.

A.

Defendants Hendrick, Kemp, Johnson, and Irby do not dispute a sufficient enforcement connection to the statute for the purposes of the *Ex parte Young* exception. The Court

agrees that there is a sufficient connection with respect to these defendants. Defendants Meacham and Henry each argue that they are entitled to Eleventh Amendment immunity because they lack sufficient enforcement connection to the challenged statutes.[4] "The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *Ex parte Young*, 209 U.S. at 157.

Defendant Henry, as Governor of Oklahoma, is required by the Oklahoma Constitution to "cause the laws of the State to be faithfully executed." Okla. Const. art. 6, § 8. The connection is "not tangential," and is sufficient to divest him of Eleventh Amendment immunity. *Reproductive Services v. Keating*, 35 F. Supp. 2d 1332, 1334 (N.D. Okla. 1998) (citing *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 568-69 (S.D. Ohio 1979), *aff'd*, 679 F.2d 656 (6th Cir. 1982)); *see also Harris*, 264 F.3d at 1290 (Colorado Governor not entitled to Eleventh Amendment immunity in connection with enforcement of Colorado's Medicaid law). Accordingly, the Court finds that defendant Henry is not entitled to Eleventh Amendment immunity on this ground.

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4. Plaintiffs do not oppose defendants' motion to dismiss W.A. "Drew" Edmondson (Attorney General for the State of Oklahoma) as a party defendant in this case on the ground of Eleventh Amendment immunity. *See* Plaintiffs' Response (Dkt. # 56), at 2 n.2. Accordingly, ORC's claims against defendant Edmondson are dismissed on this ground.

Appendix B

Defendant Meacham has a direct connection to the Choose Life Fund statute in that the state treasury is required, by the statute, to create the fund, and to maintain it as a continuing fund. Okla. Stat. § 1104.6(B). However, as Treasurer, he has no direct enforcement connection with the challenged portions of that statute, sections 1104.6(C)(4) and (D). In fact, if he were to be enjoined from enforcing his portion of the statute, plaintiff ORC would be unable to claim the relief it seeks, because there would be no fund from which it could receive money, even if it were eligible. For this reason, the Court finds that defendant Meacham is entitled to Eleventh Amendment immunity on this ground as to ORC's claims based on Okla Stat. tit. 47, §§ 1104.6(C)(4) and 1104.6(D).

Accordingly, the Court finds that, although defendants Henry, Hendrick, Kemp, Johnson, and Irby have sufficient enforcement connection to the remaining challenged statutes, ORC's claims should be **dismissed as to defendant Meacham**, on the ground of Eleventh Amendment immunity because he lacks a sufficient enforcement connection.

B.

"Because of the important interests of federalism and state sovereignty implicated by the *Ex parte Young* doctrine, the rule has its limits." *ANR Pipeline Company v. LaFaver*, 150 F.3d 1178, 1188 (10th Cir.1998). The *Ex parte Young* doctrine will not apply where the requested relief could be said "impermissibly [to] intrude upon the state's dignity and status as a sovereign government." *Harris*, 264 F.3d at 1293. "Forms of prohibited relief have included money paid from

the public treasury, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), and a quiet title action, *Coeur d'Alene Tribe*, 521 U.S. at 281-82." *Nelson v. Geringer*, 295 F.3d 1082, 1098 (10th Cir. 2002). It is uncontroverted that the taxing power is a core sovereignty interest. *See ANR Pipeline*, 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system."). Similarly, "an attempt to force the allocation of state funds implicates core sovereign interests." *Barton v. Summers*, 293 F.3d 944, 951 (6th Cir. 2002) (dealing with the allocation of tobacco settlement proceeds).

The Tenth Circuit has recognized an exception to the rule that a state's spending power is one of its core sovereign interests in the case of welfare programs at least partially funded by the federal government. *See Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1260-61 (10th Cir. 2002) ("a state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*.") (quoting *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999)). Further, although the Tenth Circuit, in addressing essentially the same facts as the Sixth Circuit in *Barton*, concluded that the Eleventh Amendment did not bar smokers' suit against the State of Colorado for disposition of tobacco settlement funds, it emphasized that the funds at issue had not yet been received by the state and that plaintiffs sought prospective relief in the form of an injunction preventing deposit of the funds into the state treasury on the grounds that the smokers had a legal right to a portion thereof. *Harris*, 264 F.3d at 1291-92. There is no federal funding or competing property right that would so serve to compromise the state's sovereign spending power in this case.

Appendix B

Plaintiffs argue that the State's spending power is not implicated here because ORC seeks only to strike the eligibility criteria in section 1104.6 which it perceives to impose unconstitutional limitations on the receipt of government funds. Plaintiffs' Response (Dkt. # 56) at 15. However, "the Supreme Court's 'unconstitutional conditions' jurisprudence has said that the state may exercise its power to spend in order to discourage protected activity." *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1109 (E.D. Cal. 2003) (citing *Maher v. Roe*, 432 U.S. 464 (1977) (holding that the government "may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds"), and *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991) (sustaining a prohibition on abortion-related advice by recipients of federal funds designated for family-planning counseling)). "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity. There is a basic difference between direct state interference with a protected activity and state encouragement of alternative activity consonant with legislative policy." *Rust*, 500 U.S. at 193. "The government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[5] *Id.* at 196. Because the requested relief would

5. Plaintiffs, also citing *Rust*, argue that "unconstitutional conditions" result from "situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program, or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197. However, the Court in

(Cont'd)

interfere with the state's spending power, and because that power is a special sovereignty interest, Ex parte Young is not applicable; this suit is barred by the Eleventh Amendment.[6]

VI.

IT IS THEREFORE ORDERED that defendants' motions to dismiss (Dkt. ## 46, 47, 50, and 51) are hereby **granted**. The first, second, third, and fourth claims for relief in plaintiffs' First Amended Complaint are **dismissed** as to all defendants because the Court's jurisdiction is barred by the Tax Injunction Act. The fifth and sixth claims for relief in plaintiffs' First Amended Complaint are **dismissed** as to all defendants because the Court's jurisdiction is barred by the Eleventh Amendment.

DATED this 16th day of August, 2005.

(Cont'd)

Rust clarified that, as long as there were no limitation on an individual's freedom to participate in such protected activity outside the bounds of the recipient program, there is no First Amendment violation. *Id.*

6. "Once effectively raised, the Eleventh Amendment becomes a limitation on [the Court's] subject-matter jurisdiction, and we may not then assume 'hypothetical jurisdiction' to reject a plaintiff's claim on the merits." *Harris*, 264 F.3d 1288. For this reason, the Court does not reach defendants' challenges to plaintiffs' claims on their merits.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 2, 2007

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 05-5160
(D.C. No. 04-CV-28-CVE-PJC)

HAROLD E. HILL; MARGARET R. McCRIGHT; WILLIAM F. McCRIGHT; JOHN J. McQUEEN; RITA J. MOSKOWITZ; BARBARA SANTEE; OKLAHOMA RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE EDUCATION FUND, INC.,

Plaintiffs - Appellants,

v.

THOMAS E. KEMP, Chairman, Oklahoma Tax Commission; JERRY JOHNSON, Vice Chairman, Oklahoma Tax Commission; CONNIE IRBY, Secretary-Member, Oklahoma Tax Commission; HOWARD H. HENDRICK, Director, Oklahoma Department of Human Services; BRAD HENRY, Governor of the State of Oklahoma; W.A. DREW EDMONDSON; SCOTT MEACHAM, Treasurer, State of Oklahoma,

Defendants - Appellees.

Appendix C

ORDER

Filed April 2, 2007

Before **TYMKOVICH**, **EBEL**, and **GORSUCH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
CLERK, COURT OF APPEALS

by: s/ [illegible]
Deputy Clerk

APPENDIX D — TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE PART IV - JURISDICTION AND VENUE - CHAPTER 85. DISTRICT COURTS; JURISDICTION

Sec. 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

APPENDIX E — TITLE 47 - MOTOR VEHICLES CHAPTER 74 - OKLAHOMA VEHICLE LICENSE AND REGISTRATION ACT SECTIONS - 1135.1-1135.8

Sec. 1135.1. Special license plates - Political subdivisions - Tax exemption or nonprofit - Physical disability - Indian tribe - Hearing impaired - Antique vehicles - Honorary consul.

A. The Oklahoma Tax Commission is hereby authorized to design and issue appropriate official special license plates to persons as provided by this section.

Special license plates shall not be transferred to any other person but shall be removed from the vehicle upon transfer of ownership and retained. The special license plate may then be used on another vehicle but only after such other vehicle has been registered for the current year.

Special license plates shall be renewed each year by the Tax Commission or a motor license agent. The Tax Commission shall annually notify by mail all persons issued special license plates. The notice shall contain all necessary information and shall contain instructions for the renewal procedure upon presentation to a motor license agent or the Tax Commission. The license plates shall be issued on a staggered system. The motor license agent fees shall be paid out of the Oklahoma Tax Commission Reimbursement Fund.

Appendix E

B. The special license plates provided by this section are as follows:

1. Political Subdivision Plates - such plates shall be designed for any vehicle owned by any political subdivision of this state having obtained a proper Oklahoma certificate of title. Such political subdivisions shall file an annual report with the Tax Commission stating the agency where such vehicle is located. Such license plates shall be permanent in nature and designed in such a manner as to remain with the vehicle for the duration of the life span of the vehicle or until the title is transferred to an owner who is not a political subdivision.

The registration fee shall be Eight Dollars ($8.00) and shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of Title 47 of the Oklahoma Statutes;

2. Tax-Exempt or Nonprofit License Plates – such plates shall be designed for:

a. any motor bus, manufactured home, or mobile chapel and power unit owned and operated by a religious corporation or society of this state holding a valid exemption from taxation issued pursuant to Section 501(a) of the Internal Revenue Code, 26 U.S.C., Section 501(a), and listed as an exempt organization in Section 501(c)(3) of the Internal Revenue Code, as amended, 26 U.S.C., Section 501(c)(3), and that is used by the

corporation or society solely for the furtherance of its religious functions,

b. any vehicle owned and operated only by nonprofit organizations devoted exclusively to youth programs including, but not limited to, the Girl Scouts and Boy Scouts of America,

c. any vehicle, except passenger automobiles, owned or operated by nonprofit organizations actually involved in programs for the employment of the handicapped and used exclusively in the transportation of goods or materials for such organization,

d. any vehicle owned and operated by a nonprofit organization that provides older persons transportation to and from medical, dental and religious services and relief from business and social isolation,

e. any vehicle owned and operated by a private nonprofit organization that:

(1) warehouses and distributes surplus foods to other nonprofit agencies and organizations, and

(2) holds a valid exemption from taxation issued pursuant to Section 501(c) of the Internal Revenue Code, as amended, 26 U.S.C., Section 501(c), and listed as an

exempt organization in Section 501(c)(3) of the Internal Revenue Code, as amended, and

(3) uses such vehicle exclusively for the transportation of such surplus foods, or

f. any vehicle which:

(1) is owned and operated by a private, nonprofit organization which is exempt from taxation pursuant to the provisions of Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C., Section 501(c)(3), and which is primarily funded by a fraternal or civic service organization with at least one hundred local chapters or clubs, and

(2) is designed and used to provide mobile health screening services to the general public at no cost to the recipient, and for which no reimbursement of any kind is received from any health insurance provider, health maintenance organization or governmental program.

Any person claiming to be eligible for a tax-exempt or nonprofit license plate under the provisions of this paragraph must have the name of the tax-exempt or nonprofit organization prominently displayed upon the outside of the vehicle, except those vehicles registered pursuant to the provisions of subparagraph b of this paragraph, unless such display is prohibited by federal

or state law or by state agency rules. No vehicle shall be licensed as a tax-exempt or nonprofit vehicle unless the vehicle has affixed on each side thereof, in letters not less than two (2) inches high and two (2) inches wide, the name of the tax-exempt or nonprofit organization or the insignia or other symbol of such organization which shall be of sufficient size, shape and color as to be readily legible during daylight hours from a distance of fifty (50) feet while the vehicle is not in motion.

The registration fee shall be Eight Dollars ($8.00) and shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of this title;

3. Physically Disabled License Plates - such plates shall be designed for persons who are eligible for an insignia as a physically disabled person under the provisions of Section 15-112 of this title. It shall prominently display the international accessibility symbol, which is a stylized human figure in a wheelchair. The Tax Commission shall also design physically disabled license plates for motorcycles owned by persons who are eligible for an insignia as a physically disabled person pursuant to the provisions of Section 15-112 of this title. Upon the death of the physically disabled person, the special license plate shall be returned to the Tax Commission. There shall be no fee for such plate in addition to the rate provided by the Oklahoma Vehicle License and Registration Act for the registration of the vehicle. For an additional fee of Ten Dollars ($10.00), a person eligible for a physically disabled license plate

shall have the option of purchasing a duplicate physically disabled special license plate which shall be securely attached to the front of the vehicle. The original physically disabled special license plate shall be securely attached to the rear of the vehicle at all times.

Any person who is eligible for a physically disabled license plate and whose vehicle has had modifications because of the physical disability of the owner or of a family member within the second degree of consanguinity of the owner, may register the vehicle for a flat fee of Twenty-five Dollars ($25.00). This fee shall be in lieu of all other registration fees provided by the Oklahoma Vehicle License and Registration Act;

4. Indian Tribal License Plates – such plates shall be designed for any vehicle of a native American Indian Tribal Association exempted in Sections 201 through 204 of Public Law 97-473 and used by the tribal association exclusively for the furtherance of its tribal functions.

The registration fee shall be Eight Dollars ($8.00) and shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of this title;

5. Hearing Impaired License Plates - such plates shall be designed for persons who are hearing impaired. Such persons may apply for a hearing-impaired license plate for each vehicle with a rated carrying capacity of one (1) ton or less upon the presentment of an application on a form furnished by the Tax Commission and certified

by a physician holding a valid license to practice pursuant to the licensing provisions of Title 59 of the Oklahoma Statutes, attesting that the person is hearing impaired. The license plate shall be designed so that such persons may be readily identified as being hearing impaired. There shall be no additional fee for the plate, but all other registration fees provided by the Oklahoma Vehicle License and Registration Act shall apply;

6. Antique or Classic vehicles – such plates shall be designed and issued for any vehicle twenty-five (25) years of age or older, based upon the date of manufacture thereof and which travels on the highways of this state primarily incidental to historical or exhibition purposes only.

The registration fee shall be Eight Dollars ($8.00) and shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of this title; and

7. Honorary Consul License Plate – such plates shall be designed to include the words "Honorary Consul" and issued to persons who are honorary consuls authorized by the United States to perform consular duties. Persons applying for such license plates must show proof of standing as an honorary consul. The fee for such plate shall be Eight Dollars ($8.00) and shall be in addition to all other registration fees required by the Oklahoma Vehicle License and Registration Act. The owner of the vehicle that possesses such license plates shall return the special license plates to the Oklahoma Tax

Commission if the owner disposes of the vehicle during the registration year or ceases to be authorized to perform consular duties.

C. Special license plates provided by this section shall be designed in such a manner as to identify the use or ownership of the vehicle. Use of any vehicle possessing a special license plate provided by this section for any purpose not specified herein shall be grounds for revocation of the special license plate and registration certificate.

D. The fees provided by this section shall be deposited in the Oklahoma Tax Commission Reimbursement Fund.

Section 1135.2. Special license plates - Armed forces - Medals of honor - Police and sheriff - Legislators and officials - Volunteers - Victims and survivors - Amateur radio operators - Alumni.

A. The Oklahoma Tax Commission is hereby authorized to design and issue appropriate official special license plates to persons in recognition of their service or awards as provided by this section.

Special license plates shall not be transferred to any other person but shall be removed from the vehicle upon transfer of ownership and retained. The special license plate may then be used on another vehicle but only after such other vehicle has been registered for the current year.

Appendix E

Special license plates shall be renewed each year by the Tax Commission or a motor license agent. The Tax Commission shall annually notify by mail all persons issued special license plates. The notice shall contain all necessary information and shall contain instructions for the renewal procedure upon presentation to a motor license agent or the Tax Commission. The license plates shall be issued on a staggered system except for legislative plates and amateur radio operator license plates.

The Tax Commission is hereby directed to develop and implement a system whereby motor license agents are permitted to accept applications for special license plates authorized under this section. The motor license agent shall confirm the applicant's eligibility, if applicable, collect and deposit any amount specifically authorized by law, accept and process the necessary information directly into such system and generate a receipt accordingly. For performance of these duties, motor license agents shall retain the fee provided in Section 1141.1 of this title for registration of a motor vehicle. The motor license agent fees for acceptance of applications and renewals shall be paid out of the Oklahoma Tax Commission Reimbursement Fund.

B. The special license plates provided by this section are as follows:

1. Prisoner of War License Plates – such plates shall be designed for honorably discharged or present members of the United States Armed Forces and civilians who were former prisoners of war held by a foreign country and who can provide proper certification of that status.

Such persons may apply for a prisoner of war license plate for no more than two vehicles with each vehicle having a rated carrying capacity of one (1) ton or less. The surviving spouse of any deceased former prisoner of war, if the spouse has not since remarried, or if remarried, the remarriage is terminated by death, divorce, or annulment, may apply for a prisoner of war license plate for one vehicle with a rated carrying capacity of one (1) ton or less. The fee provided by this section for the special license plate authorized by this paragraph shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of this title;

2. National Guard License Plates - such plates shall be designed for active or retired members of the Oklahoma National Guard. Retirees who are eligible for such plates shall provide proof of eligibility upon initial application, but shall not be required to provide proof of eligibility annually;

3. Air National Guard License Plates – such plates shall be designed for active or retired members of the Oklahoma Air National Guard. Retirees who are eligible for such plates shall provide proof of eligibility upon initial application, but shall not be required to provide proof of eligibility annually;

4. United States Armed Forces – such plates shall be designed for active, retired, former or reserve members of the United States Armed Forces, and shall identify which branch of service, and carry the emblem

and name of either the Army, Navy, Air Force, Marines or Coast Guard, according to the branch of service to which the member belongs or did belong. Former members who have been dishonorably discharged shall not be eligible for such plates. Persons applying for such license plate must show proof of present or past military service by presenting a valid Uniformed Services Identity Card or the United States Department of Defense Form (DD)214. Retired or former members who are eligible for such plates shall provide proof of eligibility upon initial application, but shall not be required to provide proof of eligibility annually;

5. Congressional Medal of Honor Recipient License Plates – such plates shall be designed for any resident of this state who has been awarded the Congressional Medal of Honor. Such persons may apply for a Congressional Medal of Honor recipient license plate for each vehicle with a rated carrying capacity of one (1) ton or less. There shall be no registration fee for the issuance of this plate;

6. Missing In Action License Plates – such plates shall be designed to honor members of the United States Armed Forces who are missing in action. The spouse of such missing person, if the spouse has not since remarried, or if remarried, the remarriage is terminated by death, divorce, or annulment, and each parent of the missing person may apply for a missing in action license plate upon presenting proper certification that the person is missing in action and that the person making the application is the qualifying spouse or the parent of the missing person. The qualifying spouse and each parent

of the missing person may each apply for the missing in action license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

7. Purple Heart Recipient License Plates – such plates shall be designed for any resident of this state presenting proper certification from the United States Department of Veterans Affairs or the Armed Forces of the United States certifying that such resident has been awarded the Purple Heart military decoration. Such persons may apply for a Purple Heart recipient license plate for vehicles having a rated carrying capacity of one (1) ton or less. The surviving spouse of any deceased veteran who has been awarded the Purple Heart military decoration, if such spouse has not since remarried, or if remarried, the remarriage has been terminated by death, divorce or annulment, may apply for such plate for one vehicle with a rated carrying capacity of one (1) ton or less;

8. Pearl Harbor Survivor License Plates – such plates shall be designed for any resident of this state who can be verified by the United States Department of Veterans Affairs or the Armed Forces of the United States as being:

a. a member of the United States Armed Forces on December 7, 1941,

b. stationed on December 7, 1941, during the hours of 7:55 a.m. to 9:45 a.m. Hawaii time at Pearl Harbor, the island of Oahu, or offshore at a distance not to exceed three (3) miles, and

c. a recipient of an honorable discharge from the United States Armed Forces.

Such person may apply for a Pearl Harbor Survivor license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

9. Iwo Jima License Plates – such plates shall be designed for any resident of this state who can be verified by the United States Department of Veterans Affairs or the Armed Forces of the United States as being:

a. a member of the United States Armed Forces in February of 1945,

b. stationed in February of 1945 on or in the immediate vicinity of the island of Iwo Jima, and

c. a recipient of an honorable discharge from the United States Armed Forces.

Such person may apply for an Iwo Jima license plate for each vehicle with a rated carrying capacity of one (1) ton or less.

Such license plate shall have the legend "Oklahoma OK" and shall contain three letters and three numbers. Between the letters and numbers shall be a logo of the flag-raising at Iwo Jima. Below the letters, logo and numbers, the plate shall contain the words "FEB." at the left, "Iwo Jima" in the center and "1945" at the right. Such plates shall not be subject to the design

requirements of any other license plates prescribed by law other than the space for the placement of the yearly decals for each succeeding year of registration after the initial issue;

10. D-Day Survivor License Plates - such plates shall be designed for any resident of this state who can be verified by the United States Department of Veterans Affairs or the Armed Forces of the United States as being:

a. a member of the United States Armed Forces on June 6, 1944,

b. a participant in the Allied invasion of the coast of Normandy on June 6, 1944; provided, if such participation cannot be verified by the United States Department of Veterans Affairs or the Armed Forces of the United States, the Tax Commission may, in its discretion, accept evidence of such participation from the person applying for the license plate, and

c. a recipient of an honorable discharge from the United States Armed Forces.

Such person may apply for a D-Day Survivor license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

11. Killed in Action License Plates – such plates shall be designed to honor members of the United States Armed Forces who were killed in action. The spouse of

the deceased person, if the spouse has not remarried, or if remarried, the remarriage is terminated by death, divorce, or annulment, may apply for a killed in action license plate upon presenting proper certification that the person was killed in action and that the person making the application is the qualifying spouse of the deceased person. The qualifying spouse may apply for a killed in action license plate for no more than two vehicles with each vehicle with a rated carrying capacity of one (1) ton or less. The fee provided by this section for the special license plate authorized by this paragraph shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of this title;

12. Gold Star Parents License Plates – such plates shall be designed to honor members of the United States Armed Forces who were killed during a war. The parents of the deceased person may apply for a gold star license plate upon presenting proper certification that the person was killed during a war and that the person making the application is the parent of the deceased person. The parent may apply for a gold star parent license plate for no more than two vehicles with each vehicle having a rated carrying capacity of one (1) ton or less. The fee provided by this section for the special license plate authorized by this paragraph shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of this title;

13. Military Decoration License Plates – such plates shall be designed for any resident of this state who has

been awarded the Distinguished Service Medal, the Distinguished Service Cross, the Distinguished Flying Cross, the Bronze Star military decoration or the Silver Star military decoration. Such persons may apply for a military decoration license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

14. Vietnam Veteran License Plates – such plates shall be designed for honorably discharged or present members of the United States Armed Forces who served in the Vietnam Conflict. Such persons may apply for a Vietnam veteran license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

15. Police Officer License Plates – such plates shall be designed for any currently employed or retired municipal police officer. Police officers may apply for police officer license plates for vehicles with a rated capacity of one (1) ton or less or for a motorcycle upon proof of employment by or retirement from a municipal police department by either an identification card or letter from the chief of the police department or the Oklahoma Police Pension and Retirement Board. Retirees who are eligible for such plates shall provide proof of eligibility upon initial application, but shall not be required to provide proof of eligibility annually. The license plates shall be designed in consultation with municipal police departments of this state; provided, the license plate for motorcycles may be of similar design to the license plate for motor vehicles or may be a new design in order to meet space requirements for a motorcycle license plate;

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16. World War II Veteran License Plates – such plates shall be designed to honor honorably discharged former members of the United States Armed Forces who are residents of this state and who can be verified by the Oklahoma Military Department, the Department of Veterans Affairs or the Armed Forces of the United States as having served on federal active duty anytime during the period from September 16, 1940, to December 7, 1945. The former members may apply for a World War II Veteran license plate for vehicles with a rated carrying capacity of one (1) ton or less.

The license plate shall have the legend "Oklahoma" and shall contain, in the center of the plate, either the Thunderbird Insignia of the 45th Infantry Division in the prescribed red and gold coloring or the emblem of the Army, Navy, Air Force, Marines or Coast Guard according to the branch of service to which the member belonged. For the purpose of license plate identification, the plate shall contain four digits, two digits at the left and two digits at the right of the insignia or emblem. Centered on the bottom of the license plate shall be the words "WORLD WAR II";

17. Korean War Veteran License Plates – such plates shall be designed to honor honorably discharged former members of the United States Armed Forces who are residents of this state and who can be verified by the Oklahoma Military Department, the Department of Veterans Affairs or the Armed Forces of the United States as having served on federal active duty anytime during the period from June 27, 1950, to January 31, 1955, both

dates inclusive. The former members may apply for a Korean War Veteran license plate for vehicles with a rated carrying capacity of one (1) ton or less.

The license plate shall have the legend "OKLAHOMA" and shall contain, in the center of the plate, either the Thunderbird Insignia of the 45th Infantry Division in the prescribed red and gold coloring or the emblem of the Army, Navy, Air Force, Marines or Coast Guard according to the branch of service to which the member belonged. For the purpose of license plate identification, the plate shall contain four digits, two digits at the left and two digits at the right of the insignia or emblem. Centered on the bottom of the license plate shall be the word "KOREA";

18. Municipal Official License Plates – such plates shall be designed for persons elected to a municipal office in this state and shall designate the name of the municipality and the district or ward in which the municipal official serves. The plates shall only be produced upon application;

19. Red Cross Volunteer License Plates – such plates shall be designed to honor American Red Cross volunteers and staff who are residents of this state. Such persons must present an identification card issued by the American Red Cross and bearing a photograph of the person. The license plate shall be designed with the assistance of the American Red Cross and shall have the legend "Oklahoma OK!" in the color Pantone 186C Red. Below the legend the symbol of the American Red Cross

and no more than three letters and three numbers shall be in the color Pantone 186C Red. Below the symbol and letters and numbers shall be the words "American Red Cross" in black. The plates shall not be subject to the design requirements of any other license plates prescribed by law other than the space for the placement of the yearly decals for each succeeding year of registration after the initial issue;

20. Veterans of Foreign Wars License Plates – such plates shall be designed to honor the veterans of foreign wars and issued to any resident of this state who is a member of a Veterans of Foreign Wars organization in this state. Such persons may apply for Veterans of Foreign Wars license plates upon proof of membership in a Veterans of Foreign Wars organization. The license plate shall be designed in consultation with the Veterans of Foreign Wars organization;

21. Desert Storm License Plates – such plates shall be designed and issued to any honorably discharged or present member of the United States Armed Forces who served in the Persian Gulf Crisis and the Desert Storm operation. Such persons may apply for a Desert Storm license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

22. Military Reserve Unit License Plates – such plates shall be designed and issued to any honorably discharged or present member of a reserve unit of the United States Armed Forces. Such persons may apply for a Military Reserve Unit license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

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23. Oklahoma City Bombing Victims and Survivors License Plates – such plates shall be designed and issued to any victim or survivor of the bombing attack on the Alfred P. Murrah Federal Building in downtown Oklahoma City on April 19, 1995;

24. Civil Air Patrol License Plates – such plates shall be designed and issued to any person who is a member of the Civil Air Patrol. Such persons may apply for a Civil Air Patrol license plate for each vehicle with a rated carrying capacity of one (1) ton or less upon proof of membership in the Civil Air Patrol. The license plate shall be designed in consultation with the Civil Air Patrol;

25. Ninety-Nines License Plates – such plates shall be designed and issued to members of the Ninety-Nines. Persons applying for such license plate must show proof of membership in the Ninety-Nines. The license plates shall be designed in consultation with the Ninety-Nines;

26. Combat Infantryman Badge License Plates – such plates shall be designed to honor recipients of the Combat Infantryman Badge. The plate shall have the legend "Oklahoma OK". Below the legend shall be the Combat Infantryman Badge and three numbers. Below the badge and the numbers shall be the words "Combat Infantryman Badge". Such persons may apply for a Combat Infantryman Badge license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

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27. Somalia Combat Veterans License Plates – such plates shall be designed and issued to any honorably discharged or present member of the United States Armed Forces who saw combat in the United Nations relief effort. Such persons may apply for a Somalia Combat Veteran license plate for each vehicle with a rated carrying capacity of one (1) ton or less;

28. Police Chaplain License Plates – such plates shall be designed and issued to members of the International Conference of Police Chaplains (ICPC) who have completed the ICPC requirements for basic certification as a police chaplain. The license plates shall be designed in consultation with the ICPC;

29. Joint Service Commendation Medal License Plates – such plates shall be designed and issued to any resident of this state who has been awarded the Joint Service Commendation Medal by the United States Secretary of Defense;

30. Merchant Marine License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission by the Oklahoma Department of Veterans Affairs, and issued to any person who during combat was a member of the Merchant Marines as certified by the Oklahoma Department of Veterans Affairs. Such license plate may be issued for each vehicle with a rated carrying capacity of one (1) ton or less;

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31. Legislative License Plates – such plates shall be designed for persons elected to the Oklahoma Legislature and shall designate the house of the Legislature in which the legislator serves and the district number;

32. Disabled Veterans License Plates – such plates shall be designed for persons presenting proper certification from the United States Department of Veterans Affairs or the Armed Forces of the United States certifying such veteran has a service-connected disability rating of fifty percent (50%) or more, regardless which agency pays the disability benefits, or that such veteran has been awarded a vehicle by the United States government or receives a grant from the United States Department of Veterans Affairs for the purchase of an automobile due to a service-connected disability rating or due to the loss of use of a limb or an eye. Such persons may apply to the Tax Commission for a disabled veterans license plate or to a motor license agent for a regular license plate for no more than two vehicles with each vehicle having a rated carrying capacity of one (1) ton or less. The surviving spouse of any deceased disabled veteran, if the spouse has not since remarried, or if remarried, the remarriage is terminated by death, divorce, or annulment, may apply for a disabled veterans license plate for one vehicle with a rated carrying capacity of one (1) ton or less. The fee provided by this section for the special license plate authorized by this paragraph shall be in addition to all other registration fees provided by law, except the registration fees levied by Section 1132 of this title. The total expense of this license plate shall not exceed Five Dollars ($5.00).

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If the person qualifies for a disabled veterans license plate and is also eligible for an insignia as a physically disabled person under the provisions of Section 15-112 of this title, the person shall be eligible to receive a disabled veterans license plate that also displays the international accessibility symbol, which is a stylized human figure in a wheelchair. Upon the death of the disabled veteran with a disabled veterans license plate with the international accessibility symbol, the plate shall be returned to the Tax Commission;

33. United States Air Force Association License Plates – such plates shall be designed for members of the United States Air Force Association. Persons applying for such license plate must show proof of membership in the Association. The license plates shall be designed in consultation with the Association;

34. Oklahoma Military Academy Alumni License Plates – such plates shall be designed and issued to any resident of this state who is an alumnus of the Oklahoma Military Academy. Such persons may apply for an Oklahoma Military Academy Alumnus license plate for each vehicle with a rated carrying capacity of one (1) ton or less. The license plates shall be designed in consultation with the Oklahoma Military Academy and shall contain the shield of the Academy;

35. Amateur Radio Operator License Plates – such plates shall be designed and issued to any person, holding a valid operator's license, technician class or better, issued by the Federal Communications Commission, and

who is also the owner of a motor vehicle currently registered in Oklahoma, in which has been installed amateur mobile transmitting and receiving equipment. Eligible persons shall be entitled to two special vehicle identification plates as herein provided. Application for such identification plates shall be on a form prescribed by the Oklahoma Tax Commission and the plates issued to such applicant shall have stamped thereon the word "Oklahoma" and bear the official call letters of the radio station assigned by the Federal Communications Commission to the individual amateur operator thereof. All applications for such plates must be made to the Oklahoma Tax Commission on or before the first day of October of any year for such plates for the following calendar year and must be accompanied by the fee required in this section together with a certificate, or such other evidence as the Tax Commission may require, of proof that applicant has a valid technician class or better amateur operator's license and proof of his ownership of a vehicle in which radio receiving and transmitting equipment is installed. Applicants shall only be entitled to one set of special identification plates in any one (1) year, and such calendar year shall be stamped thereon. The right to such special identification plates herein provided for shall continue until the amateur radio operator's license of the person to whom such plates are issued expires or is revoked;

36. American Legion License Plates – such plates shall be designed for members of the American Legion. Persons applying for such license plate must show proof

of membership. The license plates shall be designed in consultation with the American Legion of Oklahoma;

37. Deputy Sheriff License Plates – such plates shall be designed for any currently employed or retired county sheriff or deputy sheriff. County sheriffs or deputy sheriffs may apply for such plates for vehicles with a rated capacity of one (1) ton or less upon proof of employment by or retirement from a county sheriff's office by either an identification card or letter from the county sheriff or a government-sponsored retirement board from which the county sheriff or deputy sheriff may be receiving a pension. Retirees who are eligible for such plates shall provide proof of eligibility upon initial application, but shall not be required to provide proof of eligibility annually. The license plates shall be designed in consultation with the county sheriff offices of this state;

38. Surviving Spouse License Plates – such plates shall be designed for any resident of this state who is the surviving spouse of an honorably discharged veteran who died due to or as a consequence of a service-connected disability. Such surviving spouse may, if not since remarried, or if remarried, the remarriage is terminated by death, divorce or annulment, apply for a Surviving Spouse license plate for one vehicle with a rated carrying capacity of one (1) ton or less;

39. Gold Star Survivor License Plates – such plates shall be designed to honor the surviving spouses of

qualified veterans. As used in this paragraph, "qualified veteran" shall mean:

a. any person honorably discharged from any branch of the United States Armed Forces or as a member of the Oklahoma National Guard, who died as a direct result of the performance of duties for any branch of the United States Armed Forces or Oklahoma National Guard while on active military duty, or

b. any person honorably discharged from any branch of the United States Armed Forces or as a member of the Oklahoma National Guard, who died as a result of injury, illness or disease caused by the performance of such duties while on active duty, whether the death occurred while on active duty or after the honorable discharge of such person;

40. Korea Defense Service Medal License Plates – such plates shall be designed and issued to any resident of this state who has been awarded the Korea Defense Service Medal by the United States Secretary of Defense. Such persons may apply for a Korea Defense Service Medal license plate for each vehicle with a rated carrying capacity of one (1) ton or less; and

41. 180th Infantry License Plates – such plates shall be designed for members and prior members of the 180th Infantry. Persons applying for such license plate must obtain and provide proof of their membership from the

180th Infantry Association. The license plates shall be designed in consultation with the 180th Infantry.

C. Unless otherwise provided by this section, the fee for such plates shall be Eight Dollars ($8.00) and shall be in addition to all other registration fees provided by the Oklahoma Vehicle License and Registration Act. Such fees shall be deposited in the Oklahoma Tax Commission Reimbursement Fund to be used for the administration of the Oklahoma Vehicle License and Registration Act.

Section 1135.3. Special license plates - Associations, fraternities, sororities, orders, and clubs - CPA - Demonstration of support or affiliation - Military academy.

A. The Oklahoma Tax Commission is hereby authorized to design and issue appropriate official special license plates to persons wishing to demonstrate support, interest, or membership to or for an organization, occupation, cause or other subject as provided by this section.

Special license plates shall not be transferred to any other person but shall be removed from the vehicle upon transfer of ownership and retained. The special license plate may then be used on another vehicle but only after such other vehicle has been registered for the current year.

Special license plates shall be renewed each year by the Tax Commission or a motor license agent. The Tax Commission shall annually notify by mail all persons issued special license plates. The notice shall contain all necessary information and

shall contain instructions for the renewal procedure upon presentation to a motor license agent or the Tax Commission. The license plates shall be issued on a staggered system.

The Tax Commission is hereby directed to develop and implement a system whereby motor license agents are permitted to accept applications for special license plates authorized under this section. The motor license agent shall confirm the applicant's eligibility, if applicable, collect and deposit any amount specifically authorized by law, accept and process the necessary information directly into such system and generate a receipt accordingly. For performance of these duties, motor license agents shall retain the fee provided in Section 1141.1 of this title for registration of a motor vehicle. The motor license agent fees for acceptance of applications and renewals shall be paid out of the Oklahoma Tax Commission Reimbursement Fund.

If fewer than one hundred of any type of special license plates authorized prior to January 1, 2004, are issued prior to January 1, 2006, the Tax Commission shall discontinue issuance and renewal of that type of special license plate. Any such authorized special license plate registrant shall be allowed to display the license plate upon the designated vehicle until the registration expiration date. After such time the expired special license plate shall be removed from the vehicle.

Except as otherwise provided in this section, for special license plates authorized on or after July 1, 2004, no special license plates shall be developed or issued by the Tax Commission until the Commission receives one hundred

(100) prepaid applications therefor. The prepaid applications must be received by the Tax Commission within one hundred and eighty (180) days of the effective date of the authorization or the authority to issue shall be null and void. In the event one hundred (100) prepaid applications are not received by the Tax Commission within such prescribed time period any payment so received shall be refunded accordingly.

B. The special license plates provided by this section are as follows:

1. Round and Square Dance License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for round and square dancing;

2. National Association for the Advancement of Colored People License Plates – such plates shall be designed, subject to the criteria to be presented to the Tax Commission by the NAACP, and issued to any person wishing to demonstrate support for the NAACP;

3. National Rifle Association License Plates – such plates shall be designed, subject to the criteria to be presented to the Tax Commission by the National Rifle Association, and issued to any person wishing to demonstrate support for the National Rifle Association;

4. Masonic Fraternity License Plates – such plates shall be designed and issued to any resident of this state who is a member of a Masonic Fraternity of Oklahoma. Such persons may apply for a Masonic Fraternity license plate for each vehicle with a rated carrying capacity of

one (1) ton or less upon proof of a Masonic Fraternity membership or upon the presentment of an application for a Masonic Fraternity license plate authorized and approved by the Grand Lodge of Oklahoma. The license plates shall be designed in consultation with the Masonic Fraternities of Oklahoma and shall contain the Masonic emblem;

5. Shriner's Hospitals for Burned and Crippled Children License Plates – such plates shall be designed to demonstrate support for Shriner's Hospitals for Burned and Crippled Children and shall be issued to any resident of this state who is a member of a Shriner's Temple in Oklahoma. The license plate shall be designed in consultation with the Shriner's Temples in Oklahoma and shall contain the Shriner's emblem;

6. Balloonists License Plate – such plates shall be designed and issued to any person wishing to demonstrate support for hot air ballooning in this state;

7. Order of the Eastern Star License Plates – such plates shall be designed and issued to any resident of this state who is a member of an Order of the Eastern Star. Such persons may apply for an Order of the Eastern Star license plate for each vehicle with a rated carrying capacity of one (1) ton or less upon proof of an Order of the Eastern Star membership or upon the presentment of an application for an Order of the Eastern Star license plate authorized and approved by the organization. The license plate shall be designed in consultation with the Order of the Eastern Star and shall contain the Order of the Eastern Star emblem;

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8. Knights of Columbus License Plates – such plates shall be designed and issued to any resident of this state who is a member of the Knights of Columbus. Such persons may apply for a Knights of Columbus license plate for each vehicle with a rated carrying capacity of one (1) ton or less upon proof of a Knights of Columbus membership or upon the presentment of an application for a Knights of Columbus license plate authorized and approved by the organization. The license plate shall be designed in consultation with the Knights of Columbus and shall contain the Knights of Columbus emblem;

9. Jaycees License Plates – such plates shall be designed and issued to members of the Jaycees. Persons applying for such license plate must show proof of membership in the Jaycees. The license plates shall be designed in consultation with the Jaycees;

10. Ducks Unlimited License Plates – such plates shall be designed and issued to members of Ducks Unlimited. Persons applying for and renewing such license plates must show proof of tag membership in Ducks Unlimited. The license plates shall be designed in consultation with Ducks Unlimited;

11. Kiwanis International License Plates – such plates shall be designed and issued to members of Kiwanis International. Persons applying for such license plate must show proof of membership in Kiwanis International. The license plates shall be designed in consultation with Kiwanis International;

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12. Certified Public Accountants License Plates – such plates shall be designed and issued to any resident of this state who is a Certified Public Accountant. Such persons may apply for a Certified Public Accountant license plate for each vehicle with a rated carrying capacity of one (1) ton or less upon proof of status as a Certified Public Accountant. The license plates shall be designed in consultation with the Oklahoma Society of Certified Public Accountants;

13. Civil Emergency Management License Plates – such plates shall be designed and issued to persons wishing to demonstrate support for the state civil emergency management system;

14. Civilian Conservation Corps License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission, by the Civilian Conservation Corps Association, and issued to any person wishing to demonstrate support of the Civilian Conservation Corps;

15. Rotarian License Plates – such plates shall be designed and issued to any resident of this state who is a member of a Rotarian Club of Oklahoma. Such persons may apply for a Rotarian license plate for each vehicle with a rated carrying capacity of one (1) ton or less upon proof of a Rotarian Club membership or upon the presentment of an application for a Rotarian license plate authorized and approved by a Rotarian Club of Oklahoma. The license plates shall be designed in consultation with the five Rotarian District Governors and shall contain the Rotarian emblem;

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16. Benevolent Protective Order of Elks – such plates shall be designed, subject to criteria to be presented to the Tax Commission, by the Benevolent Protective Order of Elks, and issued to any resident of this state who is a member of the Benevolent Protective Order of Elks;

17. Humane Society License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the Humane Society of the United States. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates. The plate shall contain the official Humane Society logo;

18. Oklahoma Mustang Club – such plates shall be designed, subject to criteria to be presented to the Tax Commission, by the Oklahoma Mustang Club, and issued to any resident of this state who is a member of the Oklahoma Mustang Club. Such persons may apply for an Oklahoma Mustang Club license plate upon presentment of proof of membership in the Oklahoma Mustang Club. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates;

19. American Business Clubs (AMBUCS) License Plates – such plates shall be designed and issued to members of American Business Clubs. Persons applying for such license plate must show proof of membership in AMBUCS. The license plates shall be designed in consultation with American Business Clubs;

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20. West Point 200th Anniversary License Plates – such plates shall be designed and issued to any person wishing to commemorate the Two Hundredth Anniversary of the founding of the United States Military Academy at West Point, New York. The license plates shall be designed in consultation with the West Point Society of Central Oklahoma;

21. Northern Cherokee Nation of the Old Louisiana Territory License Plate – such plates shall be designed and issued to persons wishing to demonstrate support or affiliation with the Northern Cherokee Nation of the Old Louisiana Territory;

22. Oklahoma Aquarium License Plate – such plates shall be designed and issued to persons wishing to demonstrate support for the Oklahoma Aquarium. The license plates shall be designed in consultation with the Oklahoma Aquarium;

23. The Pride of Broken Arrow License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for The Pride of Broken Arrow marching band. The plates shall be designed in consultation with the Broken Arrow Public School System;

24. Fellowship of Christian Athletes License Plates – such plates shall be designed in consultation with the Fellowship of Christian Athletes and issued to members and supporters of the Fellowship of Christian Athletes;

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25. Parrothead Club License Plates – such plates shall be designed and issued to members and supporters of the Parrothead Club. The license plate shall be issued to any person in any combination of numbers and letters from one to a maximum of seven as for personalized license plates;

26. Oklahoma Bicycling Coalition License Plates – such plates shall be designed and issued to any person who is a member of the Oklahoma Bicycling Coalition. The license plates shall be designed in consultation with the Oklahoma Bicycling Coalition;

27. Electric Lineman License Plate – such plates shall be designed and issued to persons wishing to demonstrate support for Oklahoma's electric linemen. The license plates shall be designed in consultation with the Oklahoma Electric Superintendent's Association;

28. Alpha Kappa Alpha License Plate – such plates shall be designed and issued to any person who is a member of Alpha Kappa Alpha Sorority. The license plates shall be designed in consultation with the Oklahoma Chapter of Alpha Kappa Alpha Sorority;

29. The National Pan-Hellenic Council Incorporated License Plate – such plates shall be designed and issued to any person wishing to demonstrate support to any of the nine sororities and fraternities recognized by the National Pan-Hellenic Council Incorporated. The license plates shall be designed in consultation with the Oklahoma Chapter of the National Pan-Hellenic Council Incorporated;

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30. Organ, Eye and Tissue License Plate – such plates shall be designed and issued to persons wishing to demonstrate support and increase awareness for organ, eye and tissue donation. The license plates shall be designed in consultation with the Oklahoma Organ Donor Education and Awareness Program Advisory Council;

31. Central Oklahoma Habitat for Humanity License Plate – such plates shall be designed and issued to persons wishing to demonstrate support and increase awareness for Habitat for Humanity. The license plate shall be designed in consultation with Central Oklahoma Habitat for Humanity;

32. Family Career and Community Leaders of America Incorporated License Plate – such plates shall be designed and issued to persons wishing to demonstrate support for Family Career and Community Leaders of America Incorporated. The license plates shall be designed in consultation with Family Career and Community Leaders of America Incorporated;

33. Delta Sigma Theta License Plate – such plates shall be designed and issued to any person who is a member of Delta Sigma Theta Sorority. The license plates shall be designed in consultation with the Oklahoma Chapter of Delta Sigma Theta Sorority Incorporated;

34. Omega Psi Phi License Plate – such plates shall be designed and issued to any person who is a member of Omega Psi Phi Fraternity. The license plates shall be

designed in consultation with the Oklahoma Chapter of Omega Psi Phi Fraternity Incorporated;

35. Alpha Phi Alpha License Plate – such plates shall be designed and issued to any person who is a member of Alpha Phi Alpha Fraternity. The license plates shall be designed in consultation with the Oklahoma Chapter of Alpha Phi Alpha Fraternity Incorporated;

36. 50th Anniversary of the Interstate System of Highways License Plate – such plates shall be designed and issued to persons wishing to commemorate the 50th Anniversary of the Interstate System of Highways. The license plates shall be designed in consultation with the American Association of State Highway and Transportation Officials;

37. Kappa Alpha Psi License Plate - such plates shall be designed and issued to any person who is a member of Kappa Alpha Psi Fraternity. The license plates shall be designed in consultation with the Oklahoma Chapter of Kappa Alpha Psi Fraternity Incorporated;

38. Zeta Phi Beta License Plate – such plates shall be designed and issued to any person who is a member of Zeta Phi Beta Sorority. The license plates shall be designed in consultation with the Oklahoma Chapter of Zeta Phi Beta Sorority Incorporated;

39. Sigma Gamma Rho License Plate – such plates shall be designed and issued to any person who is a member of Sigma Gamma Rho Sorority. The license

plates shall be designed in consultation with the Oklahoma Chapter of Sigma Gamma Rho Sorority Incorporated;

40. Phi Beta Sigma License Plate – such plates shall be designed and issued to any person who is a member of Phi Beta Sigma Fraternity. The license plates shall be designed in consultation with the Oklahoma Chapter of Phi Beta Sigma Fraternity Incorporated;

41. Multiple Sclerosis License Plate – such plates shall be designed and issued to persons wishing to demonstrate support for and increase awareness of multiple sclerosis. The license plates shall be designed in consultation with the Oklahoma Chapter of the National Multiple Sclerosis Society;

42. Frederick Douglass High School License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for Frederick Douglass High School located in Oklahoma City. The plates shall be designed in consultation with representatives of Frederick Douglass High School National Alumni Association; and

43. United States Air Force Academy License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the United States Air Force Academy.

C. The fee for such plates shall be Fifteen Dollars ($15.00) and shall be in addition to all other registration fees provided by the Oklahoma Vehicle License and Registration Act. Unless otherwise provided in this section, the fee shall be apportioned as follows: Eight Dollars ($8.00) of the special license plate fee shall be deposited in the Oklahoma Tax Commission Reimbursement Fund to be used for the administration of the Oklahoma Vehicle License and Registration Act and the remaining Seven Dollars ($7.00) of the special license plate fee shall be apportioned as provided in Section 1104 of this title.

Section 1135.4. Personalized license plates.

A. The Oklahoma Tax Commission is hereby authorized to design and issue personalized license plates. The personalized license plates shall be issued on a staggered system except for vintage decals.

Personalized special license plates shall not be transferred to any other person but shall be removed from the vehicle upon transfer of ownership and retained. The personalized special license plate may then be used on another vehicle but only after such other vehicle has been registered for the current year.

Personalized special license plates shall be renewed each year by the Tax Commission or a motor license agent. The Tax Commission shall annually notify by mail all persons issued special license plates. The notice shall contain all necessary information and shall contain instructions for the renewal procedure upon presentation to a motor license agent or the

Tax Commission. The motor license agent fees for renewals shall be paid out of the Oklahoma Tax Commission Reimbursement Fund.

B. Such plates shall be designed and issued for the following:

1. Any person in any combination of numbers or letters from one to a maximum of seven;

2. Persons eligible for two or more of the military decoration special license plates provided for in Title 47 of the Oklahoma Statutes. Such plates may be issued in any combination of emblems. However, such plates shall only display up to three emblems and shall also display any combination of letters or numbers from one to a maximum of three;

3. Motorcycles in any combination of numbers or letters from one to a maximum of six;

4. Persons eligible for Korean War Veteran license plates provided for in Title 47 of the Oklahoma Statutes. Such plates may display any combination of letters or numbers up to three on each side of the insignia or emblem;

5. Persons eligible for World War II Veteran license plates provided for in Title 47 of the Oklahoma Statutes. Such plates may display any combination of letters or numbers up to three on each side of the insignia or emblem; and

6. Persons owning vehicles which are twenty-one (21) years and older are qualified to submit for approval by the Tax Commission or a motor license agent a vintage but expired official Oklahoma license plate which is twenty-one (21) years and older. Upon approval of such personalized plate, the owner shall be issued the annual registration decal which the Tax Commission or agent shall direct to be affixed.

C. The fee for such plates shall be Twenty Dollars ($20.00) and shall be in addition to all other registration fees provided by the Oklahoma Vehicle License and Registration Act. Eight Dollars ($8.00) of the personalized tag fee shall be deposited in the Oklahoma Tax Commission Reimbursement Fund to be used for the administration of the Oklahoma Vehicle License and Registration Act. Twelve Dollars ($12.00) of the personalized tag fee shall be apportioned as provided in Section 1104 of Title 47 of the Oklahoma Statutes.

Section 1135.5. Special license plates - Demonstration of support and financial assistance to specific causes.

A. The Oklahoma Tax Commission is hereby authorized to design and issue appropriate official special license plates to persons wishing to demonstrate support and provide financial assistance as provided by this section.

Special license plates shall not be transferred to any other person but shall be removed from the vehicle upon transfer of ownership and retained. The special license plate may then

be used on another vehicle but only after such other vehicle has been registered for the current year with a motor license agent.

Special license plates shall be renewed each year by the Tax Commission or a motor license agent. The Tax Commission shall annually notify by mail all persons issued special license plates. The notice shall contain all necessary information and shall contain instructions for the renewal procedure upon presentation to a motor license agent or the Tax Commission. The license plates shall be issued on a staggered system.

The Tax Commission is hereby directed to develop and implement a system whereby motor license agents are permitted to accept applications for special license plates authorized under this section. The motor license agent shall confirm the applicant's eligibility, if applicable, collect and deposit any amount specifically authorized by law, accept and process the necessary information directly into such system and generate a receipt accordingly. For performance of these duties, motor license agents shall retain the fee provided in Section 1141.1 of this title for registration of a motor vehicle. The motor license agent fees for acceptance of applications and renewals shall be paid out of the Oklahoma Tax Commission Reimbursement Fund.

If fewer than one hundred of any type of special license plates authorized prior to January 1, 2004, are issued prior to January 1, 2006, the Tax Commission shall discontinue issuance and renewal of that type of special license plate. Any such authorized special license plate registrant shall be allowed to display the license plate upon the designated

vehicle until the registration expiration date. After such time the expired special license plate shall be removed from the vehicle.

For special license plates authorized on or after July 1, 2004, no special license plates shall be developed or issued by the Tax Commission until the Commission receives one hundred prepaid applications therefor. The prepaid applications must be received by the Tax Commission within one hundred and eighty (180) days of the effective date of the authorization or the authority to issue shall be null and void. In the event one hundred prepaid applications are not received by the Tax Commission within such prescribed time period any payment so received shall be refunded accordingly.

B. The special license plates provided by this section are as follows:

1. University or College Supporter License Plates – such plates shall be designed and issued to any person wishing to demonstrate support to any state-supported or private university or college. As provided in this section, an amount of the fee collected shall be apportioned as provided in Section 1104.1 of this title;

2. Environmental Awareness License Plates – such plates shall be designed, subject to the criteria to be presented to the Tax Commission by the Department of Environmental Quality in consultation with the Oklahoma Arts Council, and issued to any person wishing to demonstrate support to implement the statewide general public environmental education

program created pursuant to the provisions of the Oklahoma Environmental Quality Code. Such plates shall be designed and issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates. A dealer's license plate issued pursuant to Section 1116.1 or 1128 of this title may be designated an Environmental Awareness License Plate upon payment of the fee imposed by this section and any other registration fees required by the Oklahoma Vehicle License and Registration Act. As provided in this section, an amount of the fee collected shall be apportioned pursuant to Section 1104.2 of this title;

3. Firefighter License Plates – such plates shall be designed for any career or retired firefighter, volunteer or paid. Firefighters may apply for firefighter plates for up to four vehicles with a rated capacity of one (1) ton or less or for a motorcycle upon proof of a fire department membership by either an identification card or letter from the chief of the fire department. Retirees who are eligible for such plates shall provide proof of eligibility upon initial application, but shall not be required to provide proof of eligibility annually. The surviving spouse of any deceased firefighter, if the spouse has not since remarried, may apply for a firefighter license plate for one vehicle with a rated carrying capacity of one (1) ton or less or for a motorcycle upon proof that the deceased firefighter was a member of a fire department by either an identification card or letter from the chief of the fire department.

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Except for motorcycles, the license plate shall have the legend "Oklahoma" in the color Pantone 186C Red and shall contain no more than three letters and three numbers in the color Pantone 301C Blue. Between the letters and numbers shall be the Firefighter Maltese Cross Logo in the color Pantone 186C Red outlined in the color Pantone 301C Blue. Below the letters and the logo shall be the word "Firefighter" in the color Pantone 186C Red. The license plate for motorcycles may be of a similar design as space permits or a new design in order to meet the space requirements of a motorcycle license plate. The plates shall not be subject to the design requirements of any other license plates prescribed by law other than the space for the placement of the yearly decals for each succeeding year of registration after the initial issue.

As provided in this section, an amount of the fee collected shall be deposited to the Oklahoma State Firemen's Museum Building & Memorial Fund for support of the Oklahoma Firefighter Fallen and Living Memorial;

4. Wildlife Conservation License Plates – such plates shall be designed, subject to the criteria to be presented to the Tax Commission by the Oklahoma Department of Wildlife Conservation in consultation with the Oklahoma Arts Council, and issued to any person wishing to demonstrate support for wildlife conservation in this state through the Wildlife Diversity Fund, provided for in Section 3-310 of Title 29 of the Oklahoma Statutes. Such plates may be designed and issued to any person as for personalized license plates.

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As provided in this section, an amount of the fee collected shall be apportioned pursuant to subsection D of Section 3-310 of Title 29 of the Oklahoma Statutes;

5. Child Abuse Prevention License Plates – such plates shall be designed, subject to the criteria to be presented to the Tax Commission by the Office of Child Abuse Prevention in the State Department of Health and the Oklahoma Committee to Prevent Child Abuse, and issued to any person wishing to demonstrate support for the prevention of child abuse.

As provided in this section, an amount of the fee collected shall be deposited in the Child Abuse Prevention Fund;

6. United States Olympic Committee Supporter License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the United States Olympic Committee. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates. The plate shall contain the official United States Olympic Committee logo. The Tax Commission shall be authorized, if necessary, to enter into a licensing agreement with the United States Olympic Committee for any licensing fees which may be required in order to use the United States Olympic Committee logo or design. The licensing agreement shall provide for a payment of not more than Twenty-five Dollars ($25.00) for each license plate issued;

7. Oklahoma History License Plates – such plates shall be designed and issued to any person wishing to demonstrate interest in Oklahoma history. As provided in this section, an amount of the fee collected shall be deposited to the Oklahoma Historical Society Revolving Fund to be used for educational purposes;

8. Historic Route 66 License Plates – such plates shall be designed to honor historic Route 66, also known as the "Mother Road". As provided in this section, an amount of the fee collected shall be apportioned to the Oklahoma Historical Society Revolving Fund to be distributed to the Route 66 Museum located in Clinton, Oklahoma;

9. Heart of the Heartland License Plates – such plates shall be designed and issued to any person wishing to honor the victims of the terrorist bombing attack on the Alfred P. Murrah Federal Building in downtown Oklahoma City on April 19, 1995. As provided in this section, an amount of the fee collected shall be deposited in the Heart of the Heartland Scholarship Fund, as established in Section 2282 of Title 70 of the Oklahoma Statutes;

10. Emergency Medical Technician License Plates – such plates shall be designed and issued to any person who is an emergency medical technician. Such persons may apply for an emergency medical technician license plate for each vehicle with a rated carrying capacity of one (1) ton or less upon proof of an emergency medical technician's license. The license plate shall be designed

in consultation with the state association of emergency medical technicians. As provided in this section, an amount of the fee collected shall be apportioned to the county of residence of the person purchasing the plates to be equally apportioned by the county to the city and county volunteer fire departments in the county;

11. Fight Breast Cancer License Plates – such plates shall be designed to demonstrate support for the prevention and treatment of breast cancer in this state. As provided in this section, an amount of the fee collected shall be apportioned to the Breast Cancer Act Revolving Fund;

12. Crime Victims Awareness License Plates – such plates shall be designed and issued to any person wishing to demonstrate awareness of and support for victims of crimes. The license plates shall be designed in consultation with the Oklahoma Crime Victims Centre. As provided in this section, an amount of the fee collected shall be apportioned to the Attorney General's Revolving Fund for the Office of the Attorney General, which is hereby directed to use such funds to contract with a statewide nonprofit organization to provide services to crime victims;

13. Oklahoma Safe Kids Association License Plates – such plates shall be designed and issued to any person wishing to demonstrate support and awareness of the Oklahoma Safe Kids Association. The license plate shall be designed in consultation with the Oklahoma Safe Kids Association. As provided in this section, an amount of

the fee collected shall be deposited in the Children's Hospital – Oklahoma Safe Kids Association Revolving Fund to be distributed to the Oklahoma Safe Kids Association program;

14. Four-H Club License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission by the Four-H Foundation, and issued to any person wishing to demonstrate support of the Four-H Club. Such plates may be designed and issued to any person as for personalized license plates. As provided in this section, an amount of the fee collected shall be apportioned to the OSU Extension Service License Plate Revolving Fund created in Section 1104.4 of this title;

15. Agricultural Awareness License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission, by the Oklahoma Department of Agriculture, Food, and Forestry in consultation with the Oklahoma Arts Council, and issued to any person wishing to demonstrate support of the Department's Ag in the Classroom Education Program. As provided in this section, an amount of the fee collected shall be apportioned as provided in Section 1104.3 of this title;

16. Oklahoma Statehood Centennial License Plates – such plates shall be designed and issued to any person wishing to commemorate the centennial of Oklahoma's admission to statehood in 1907. The license plates shall be designed in consultation with the Oklahoma Capitol Complex and Centennial Commemoration Commission. As provided in this section, an amount of the fee

collected shall be deposited in the Oklahoma Capitol Complex and Centennial Commemoration Commission Revolving Fund created in Section 98.5 of Title 73 of the Oklahoma Statutes;

17. Support Education License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission by the State Department of Education in consultation with the Oklahoma Arts Council, and issued to any person wishing to demonstrate support for education in this state. All motor license agents shall display a sample of the Support Education License plate in the area of the business accessed by the public. Twenty-three Dollars ($23.00) of the fee collected shall be apportioned as follows:

a. five percent (5%) shall be deposited to the Education Reform Revolving Fund,

b. five percent (5%) shall be deposited to the Higher Education Revolving Fund,

c. five percent (5%) shall be deposited to the State Career Technology Fund, and

d. eighty-five percent (85%) of the fee shall be deposited to the Teachers' Retirement Benefit Fund as set forth in Section 17-108 of Title 70 of the Oklahoma Statutes.

However, when the Teachers' Retirement Benefit Fund attains a seventy percent (70%) funded ratio based on an annual actuarial valuation as required by law, the amount of the fee shall be apportioned equally pursuant to subparagraphs a, b and c of this paragraph;

18. Retired Oklahoma Highway Patrol Officers License Plates – such plates shall be designed and issued to any retired officer of the Oklahoma Highway Patrol. The license plate shall have the legend "Oklahoma" and shall contain, in the center of the plate, the Highway Patrol Officers patch using the same colors and pattern as used in the patch. Centered on the bottom of the license plate shall be the word "Retired". The letters "TRP" shall be used in combination with three numbers on either side of the insignia or emblem. The color of the letters and numbers shall be brown. Retirees who are eligible for such plates shall provide proof of eligibility upon initial application, but shall not be required to provide proof of eligibility annually. The surviving spouse of any deceased retired officer of the Oklahoma Highway Patrol, if the spouse has not since remarried, or if remarried, the remarriage is terminated by death, divorce, or annulment, may apply for a Retired Oklahoma Highway Patrol Officers license plate. As provided in this section, an amount of the fee collected shall be deposited into the Law Enforcement Retirement Fund;

19. Boy Scouts of America Supporter License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the Boy Scouts of America. The plates shall be issued to any person in any

combination of numbers and letters from one to a maximum of seven, as for personalized license plates. The plate shall contain the official Boy Scouts of America logo. The Tax Commission shall be authorized, if necessary, to enter into a licensing agreement with the Boy Scouts of America for any licensing fees which may be required in order to use the Boy Scouts of America logo or design. The licensing agreement shall provide for a payment to the Boy Scouts of America of not more than Twenty Dollars ($20.00) for each license plate issued;

20. Urban Forestry and Beautification License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission, by the Oklahoma Department of Agriculture, Food, and Forestry in consultation with nonprofit organizations in this state that develop and operate programs to encourage urban forestry and beautification, and issued to any person wishing to demonstrate support of such programs. As provided in this section, an amount of the fee collected shall be apportioned as provided in Section 1104.5 of this title;

21. Oklahoma State Parks Supporter License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission by the Oklahoma Tourism and Recreation Department, and issued to any person wishing to demonstrate support for the Oklahoma state parks system. Twenty-three Dollars ($23.00) of the fee collected shall be deposited in the Oklahoma Tourism and Recreation Department Revolving Fund. Such

money shall be designated for and may only be expended for the support of Oklahoma state parks;

22. Adoption Creates Families License Plates – such plates shall be issued to any person wishing to demonstrate support of pregnant women who are committed to placing their children for adoption and wishing to provide assistance to guardians, adoptive parents and other created families to assist in the adoption and placement of children in permanent, safe homes. The license plates shall be designed and final terminology delivered in consultation with the Oklahoma Adoption Coalition and the Department of Human Services. Twenty-five Dollars ($25.00) of the fee collected shall be deposited in a revolving fund established in the State Treasury for and to be used by the Department of Human Services for the implementation of the Investing in Stronger Oklahoma Families Act specifically for created families;

23. Choose Life License Plates – such plates shall be designed, subject to criteria presented to the Tax Commission, by Choose Life, Inc., and issued to any person who wishes to demonstrate support of organizations that encourage adoption as a positive choice for women with unplanned pregnancies. As provided in this section, an amount of the fee collected shall be deposited in the Choose Life Assistance Program Revolving Fund established in Section 1104.6 of this title;

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24. Future Farmers of America License Plate – such plates shall be designed and issued to persons wishing to demonstrate support for the Oklahoma FFA (formerly known as Future Farmers of America). The license plates shall be designed in consultation with the Oklahoma FFA Foundation Board of Directors. As provided in this section, an amount of the fee collected shall be apportioned as provided in Section 1104.7 of this title;

25. Lions Club License Plates – such plates shall be designed and issued to persons wishing to demonstrate support for the Lions Club of Oklahoma. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates. The license plates shall be designed in consultation with the Oklahoma Lions Service Foundation and shall contain the official logo of the International Association of Lions Clubs. The Tax Commission shall be authorized to enter into a licensing agreement with the Oklahoma Lions Service Foundation. The licensing agreement shall provide for a payment to the Oklahoma Lions Service Foundation of not more than Ten Dollars ($10.00) for each license plate issued;

26. Color Oklahoma License Plates – such plates shall be designed, subject to criteria to be presented to the Tax Commission by the Oklahoma Native Plant Society, and issued to any person wishing to demonstrate support for preserving and planting wildflowers and native plants in Oklahoma and to promote Oklahoma's wildflower heritage through education. As provided in this section, an amount of the fee collected shall be apportioned as provided in Section 1104.8 of this title;

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27. Girl Scouts of the United States of America Supporter License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the Girl Scouts of the United States of America. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates. The plate shall contain the official Girl Scouts of the United States of America logo. The Tax Commission shall be authorized, if necessary, to enter into a licensing agreement with the Girl Scouts of the United States of America for any licensing fees which may be required in order to use the Girl Scouts of the United States of America logo or design. The licensing agreement shall provide for a payment to the Girl Scouts of Magic Empire Council, acting on behalf of all Oklahoma Girl Scout councils, of not more than Twenty Dollars ($20.00) for each license plate issued;

28. Oklahoma City Memorial Marathon License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the Oklahoma City Memorial Marathon. The plate shall be designed in consultation with the Oklahoma City Memorial Marathon. The Tax Commission shall be authorized to enter into a licensing agreement with the Oklahoma City Memorial Marathon for any licensing fees which may be required in order to use the Oklahoma City Memorial Marathon logo or design. The licensing agreement shall provide for a payment to the Oklahoma City Memorial Marathon of not more than Twenty Dollars ($20.00) for each license plate issued;

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29. Oklahoma Scenic Rivers License Plate – such plates shall be designed to demonstrate support for the Oklahoma Scenic Rivers. The plates shall be designed in consultation with the Oklahoma Scenic Rivers Commission. Twenty-five Dollars ($25.00) of the fee shall be apportioned to the Oklahoma Scenic Rivers Commission;

30. Fight Cancer License Plate – such plates shall be designed to demonstrate support for the Oklahoma Central Cancer Registry. The plate shall contain the American Cancer Society logo. The American Cancer Society logo shall be used in accordance with the American Cancer Society's branding guidelines and shall only be utilized to support the Oklahoma Central Cancer Registry. Twenty Dollars ($20.00) of the fee shall be apportioned to the Oklahoma Central Cancer Registry Revolving Fund;

31. Animal Friendly License Plate – such plates shall be designed and issued to any person wishing to demonstrate support for controlling the overpopulation of dogs and cats through educational and sterilization efforts. The plates shall be designed in consultation with the Veterinary Medical Association. Twenty Dollars ($20.00) of the fee collected shall be designated by the purchaser of the plate to be deposited in the Oklahoma Pet Overpopulation Fund created in Section 2368.13 of Title 68 of the Oklahoma Statutes or the Animal Friendly Revolving Fund created in Section 1104.10 of this title;

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32. Patriot License Plate – such plates shall be designed in consultation with the Military Department of Oklahoma and issued to any person wishing to demonstrate support for Oklahoma residents who are members of the Oklahoma National Guard and deployed on active duty. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates. As provided in this section, a portion of the fee collected shall be deposited in the Patriot License Plate Revolving Fund created in Section 1104.11 of this title;

33. Armed Forces Veterans Motorcycle License Plate – such plates shall be designed for use on a motorcycle in consultation with A Brotherhood Aiming Toward Education of Oklahoma, Inc. (ABATE), and issued to any honorably discharged former member of the United States Armed Forces wishing to demonstrate support for the 45th Infantry Division Museum. Persons applying for such license plate must show proof of past military service. As provided in this section, a portion of the fee collected shall be deposited in the 45th Infantry Division Museum Fund created in Section 235.1 of Title 44 of the Oklahoma Statutes;

34. Global War on Terrorism License Plate – such plate shall be designed in consultation with the Military Department of Oklahoma and issued to any person wishing to demonstrate support for Oklahoma residents who are members of the Armed Forces of the United States or Oklahoma National Guard that have served in the Global War on Terrorism. The plate shall be issued

to any person in any combination of numbers and letters from one to a maximum of six. As provided in this section, a portion of the fee collected shall be deposited in the 45th Infantry Division Museum Fund created in Section 235.1 of Title 44 of the Oklahoma Statutes;

35. Boys and Girls Clubs of America Supporter License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the Boys and Girls Clubs of America. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of seven, as for personalized license plates. The plate shall contain the official Boys and Girls Clubs of America logo. The Tax Commission, if necessary, may enter into a licensing agreement with the Boys and Girls Clubs of America for any licensing fees which may be required in order to use the Boys and Girls Clubs of America logo or design. The licensing agreement shall provide for a payment to the Boys and Girls Clubs of America of not more than Twenty Dollars ($20.00) for each license plate issued;

36. Oklahoma Quarter Horse License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for the American Quarter Horse in Oklahoma. The plate shall be designed in consultation with the Oklahoma Quarter Horse Association. As provided in this section, a portion of the fee collected shall be deposited in the Oklahoma Quarter Horse Revolving Fund created in Section 3 of Enrolled Senate Bill No. 1074 of the 2nd Session of the 50th Oklahoma Legislature;

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37. Oklahoma Association for the Deaf License Plate – such plates shall be designed in consultation with the Oklahoma Association for the Deaf and issued to any person wishing to demonstrate support for Oklahoma residents who are deaf. The plates shall be issued to any person in any combination of numbers and letters from one to maximum of seven, as for personalized license plates. As provided in this section, a portion of the fee collected shall be deposited in the Oklahoma Association for the Deaf License Plate Revolving Fund created in Section 22 of Enrolled House Bill No. 2708 of the 2nd Session of the 50th Oklahoma Legislature;

38. Oklahoma City Zoo License Plate – such plates shall be issued to any person wishing to demonstrate support for the Oklahoma City Zoo. The license plates shall be designed in consultation with the Oklahoma Zoological Society, Inc. As provided in this section, an amount of the fee collected shall be deposited in the Oklahoma Zoological Society Revolving Fund created in Section 4 of Enrolled Senate Bill No. 1412 of the 2nd Session of the 50th Oklahoma Legislature;

39. March of Dimes License Plate – such plates shall be issued to persons wishing to demonstrate support for the March of Dimes mission to improve the health of babies by preventing birth defects, premature birth and infant mortality. The license plates shall be designed in consultation with the Oklahoma Chapter March of Dimes. As provided in this section, an amount of the fee collected shall be deposited in the Oklahoma Prevent Birth Defects, Premature Birth and Infant Mortality Fund

established in Section 5 of Enrolled Senate Bill No. 1412 of the 2nd Session of the 50th Oklahoma Legislature; and

40. Support Our Troops Supporter License Plates – such plates shall be designed and issued to any person wishing to demonstrate support for Support Our Troops Incorporated. The plates shall be issued to any person in any combination of numbers and letters from one to a maximum of six. The plate shall contain the official Support Our Troops Incorporated logo which includes the mark "Support Our Troops" across the bottom of the plate. The Tax Commission, if necessary, may enter into a licensing agreement with Support Our Troops Incorporated for any licensing fees which may be required in order to use the Support Our Troops Incorporated logo or design. The licensing agreement shall provide for a payment to Support Our Troops Incorporated of Twenty-five Dollars ($25.00) for each license plate issued.

C. The fee for such plates shall be Thirty-five Dollars ($35.00) and shall be in addition to all other registration fees provided by the Oklahoma Vehicle License and Registration Act. The fee shall be apportioned as follows:

1. Twenty Dollars ($20.00) or any other amount as provided in this title of the fee shall be apportioned as provided or deposited in a fund as specified within the paragraph authorizing the special license plate;

2. Eight Dollars ($8.00) of the fee shall be deposited in the Oklahoma Tax Commission Reimbursement Fund to be used for the administration of the Oklahoma Vehicle License and Registration Act; and

3. Any remaining amounts of the fee shall be apportioned as provided in Section 1104 of this title.

Section 1135.6. National Association for Stock Car Auto Racing Driver (NASCAR) Theme License Plates.

The Oklahoma Tax Commission is hereby authorized to design and issue National Association for Stock Car Auto Racing Driver ("NASCAR") Theme License Plates. Such plates shall be designed and issued to any person wishing to demonstrate interest in NASCAR auto racing. The plates shall be of such design as the supplier of the license plates in consultation with the Oklahoma Tax Commission may prescribe. The fee for such plate shall be Forty Dollars ($40.00) and shall be in addition to all other registration fees required by the Oklahoma Vehicle License and Registration Act. The Tax Commission shall be authorized to enter into a licensing agreement with the supplier of such NASCAR Driver license plates or other entity for any required licensing fees. The licensing agreement shall provide for a payment of not more than Twenty-five Percent (25%) of the fee authorized for each license plate issued. Five Dollars ($5.00) of the forty-dollar fee shall be apportioned to the General Revenue Fund. The remaining amount of such fee shall be deposited in the Oklahoma Tax Commission Reimbursement Fund.

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For license plates numbered zero (0) through one hundred (100) displaying a particular NASCAR Driver theme, the Oklahoma Tax Commission may establish an auction or similar procedure for the purpose of determining the order in which such distinctive license plates are sold and the amount of the additional fee for the distinctive license plates. This amount shall be due at the time the original application is submitted to the Tax Commission and Forty Dollars ($40.00) thereafter annually at the time of renewal registration.

Section 1135.7. Authorization to design and issue special license plates.

A. Beginning January 1, 2006, the Oklahoma Tax Commission is authorized to design and issue special license plates to any person that applies to the Tax Commission for the creation of a special license plate and meets the minimum standards and qualifications specified in this section.

B. If the following standards and guidelines are satisfied, the Tax Commission shall issue a special license plate to the person making application for the special license plate:

1. The license plate is to:

a. show membership in or affiliation with an organization, or

b. demonstrate support for an organization, group or cause;

2. The license plate does not advertise or endorse a product, brand, or service that is provided for sale;

3. The license plate does not promote any philosophy based on prejudice or that is contrary to state civil rights laws; and

4. Five hundred prepaid applications for the special license plate are received by the Tax Commission.

C. The fee for special license plates that do not provide financial assistance shall be Fifteen Dollars ($15.00) and shall be in addition to all other registration fees provided by the Oklahoma Vehicle License and Registration Act. Unless otherwise provided in this section, the fee shall be apportioned as follows: Eight Dollars ($8.00) of the special license plate fee shall be deposited in the Oklahoma Tax Commission Reimbursement Fund to be used for the administration of the Oklahoma Vehicle License and Registration Act and the remaining Seven Dollars ($7.00) of the special license plate fee shall be apportioned as provided in Section 1104 of Title 47 of the Oklahoma Statutes.

D. The fee for special license plates that provide financial assistance shall be Thirty-five Dollars ($35.00) and shall be in addition to all other registration fees provided by the Oklahoma Vehicle License and Registration Act. The fee shall be apportioned as follows:

1. Twenty Dollars ($20.00) of the fee shall be apportioned to the License Plate Special Program Assistance Revolving Fund created in Section 7 of this

act to be used in the manner detailed in the application for the special license plate;

2. Eight Dollars ($8.00) of the fee shall be deposited in the Oklahoma Tax Commission Reimbursement Fund to be used for the administration of the Oklahoma Vehicle License and Registration Act; and

3. Seven Dollars ($7.00) of the fee shall be apportioned as provided in Section 1104 of Title 47 of the Oklahoma Statutes.

E. If a person applies for a special license plate that provides financial assistance, the application shall designate a state agency to be responsible for expending the funds generated by the special license plate and the application shall designate a specific public purpose for which the funds are to be used.

F. Special license plates shall not be transferred to any other person but shall be removed from the vehicle upon transfer of ownership and retained. The special license plate may then be used on another vehicle but only after such other vehicle has been registered for the current year.

Special license plates shall be renewed each year by the Tax Commission or a motor license agent. The Tax Commission shall annually notify by mail all persons issued special license plates. The notice shall contain all necessary information and shall contain instructions for the renewal procedure upon presentation to a motor license agent or the Tax Commission. The license plates shall be issued on a staggered system.

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The Tax Commission is hereby directed to develop and implement a system whereby motor license agents are permitted to accept applications for special license plates authorized under this section. The motor license agent shall confirm the applicant's eligibility, if applicable, collect and deposit any amount specifically authorized by law, accept and process the necessary information directly into such system and generate a receipt accordingly. For performance of these duties, motor license agents shall retain the fee provided in Section 1141.1 of Title 47 of the Oklahoma Statutes for registration of a motor vehicle. The motor license agent fees for acceptance of applications and renewals shall be paid out of the Oklahoma Tax Commission Reimbursement Fund.

G. All special plates issued by the Tax Commission prior to the effective date of this act shall not be subject to the requirements and qualifications outlined in this section.

H. As used in this section, "person" includes an individual, group, organization or not-for-profit corporation that is recognized as such by the Internal Revenue Service.

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Section 1135.8. License Plate Special Program Assistance Revolving Fund.

A. There is hereby created in the State Treasury a revolving fund for the Oklahoma Tax Commission, to be designated the "License Plate Special Program Assistance Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of any monies transferred thereto by paragraph 1 of subsection D of Section 6 of this act.

B. All monies accruing to the credit of said fund are hereby appropriated and shall be expended by the Tax Commission on December 31 of each year. The monies shall be distributed to the appropriate state agency to be expended in accordance with the specifications contained in the application for each special license plate that provides financial support in an amount based on the number of special license plates that are in circulation for that particular organization.

APPENDIX F— TITLE 47 – MOTOR VEHICLES, CHAPTER 74 – OKLAHOMA VEHICLE LICENSE AND REGISTRATION ACT, SECTIONS – 1104, 1104.1-1104.15

Section 1104. Apportionment of fees, taxes and penalties collected.

A. Unless otherwise provided by law, all fees, taxes and penalties collected or received pursuant to the Oklahoma Vehicle License and Registration Act or Section 1-101 et seq. of this title shall be apportioned and distributed monthly by the Oklahoma Tax Commission in accordance with this section.

B. 1. The following percentages of the monies referred to in subsection A of this section shall be apportioned to the various school districts in accordance with paragraph 2 of this subsection:

a. from October 1, 2000, until June 30, 2001, thirty-five and forty-six one-hundredths percent (35.46%),

b. for the year beginning July 1, 2001, and ending June 30, 2002, thirty-five and ninety-one one-hundredths percent (35.91%), and

c. for the year beginning July 1, 2002, and all subsequent years, thirty-six and twenty one-hundredths percent (36.20%).

2. The monies apportioned pursuant to subparagraphs a through c of paragraph 1 of this subsection shall be apportioned to the various school districts as follows:

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a. except as otherwise provided in this subparagraph, each district shall receive the same amount of funds as such district received from the taxes and fees provided in this title in the corresponding month of the preceding year. Any district eligible for funds pursuant to the provisions of this section that was not eligible the preceding year shall receive an amount equal to the average daily attendance of the applicable year multiplied by the average daily attendance apportionment within such county for each appropriate month. For fiscal year 1995 and thereafter, any district which received less than twenty-five percent (25%) of the average apportionment of the monies made to school districts in this state based on average daily attendance in fiscal year 1995 shall receive an amount equal to the average daily attendance in the 1994-1995 school year multiplied by the average daily attendance apportionment within the county in which the district is located for each appropriate month, and

b. any funds remaining unallocated following the allocation provided in subparagraph a of this paragraph shall be apportioned to the various school districts so that each district shall first receive the cumulative total of the monthly apportionments for which it is otherwise eligible under subparagraph a of this paragraph and then an amount based upon the proportion that each district's average daily attendance bears to the total average daily attendance of those districts entitled to receive funds pursuant to this section as certified by the State Department of Education.

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Each district's allocation of funds shall be remitted to the county treasurer of the county wherein the administrative headquarters of the district are located.

No district shall be eligible for the funds herein provided unless the district makes an ad valorem tax levy of fifteen (15) mills and maintains nine (9) years of instruction and pursuant to the rules of the State Board of Education, is authorized to maintain ten (10) years of instruction.

C. 1. The following percentages of the monies referred to in subsection A of this section shall be remitted to the State Treasurer to be credited to the General Revenue Fund of the State Treasury:

a. from October 1, 2000, until June 30, 2001, forty-five and ninety-seven one-hundredths percent (45.97%),

b. for the year beginning July 1, 2001, and ending June 30, 2002, forty-five and twenty-nine one-hundredths percent (45.29%),

c. for the year beginning July 1, 2002, and for the subsequent fiscal years ending June 30, 2007, forty-four and eighty-four one-hundredths percent (44.84%),

d. for the year beginning July 1, 2007, and ending June 30, 2008, thirty-nine and eighty-four one-hundredths percent (39.84%),

e. for the year beginning July 1, 2008, and ending June 30, 2009, thirty-four and eighty-four one-hundredths percent (34.84%), and

f. for the year beginning July 1, 2009, and all subsequent years, twenty-nine and eighty-four one-hundredths percent (29.84%).

2. In the event that additional monies are necessary pursuant to subsection N of this section, such additional monies shall be deducted from the monies apportioned to the General Revenue Fund.

D. The following percentages of the monies referred to in subsection A of this section shall be remitted to the State Treasurer to be credited to the State Transportation Fund:

1. From October 1, 2000, until June 30, 2001, thirty one-hundredths percent (0.30%); and

2. For the year beginning July 1, 2001, and all subsequent years, thirty-one one-hundredths percent (0.31%).

E. 1. The following percentages of the monies referred to in subsection A of this section shall be apportioned to the various counties as set forth in paragraph 2 of this section:

a. from October 1, 2000, until June 30, 2001, seven and nine one-hundredths percent (7.09%),

b. for the year beginning July 1, 2001, and ending June 30, 2002, seven and eighteen one-hundredths percent (7.18%), and

c. for the year beginning July 1, 2002, and all subsequent years, seven and twenty-four one-hundredths percent (7.24%).

2. The monies apportioned pursuant to subparagraphs a through c of paragraph 1 of this subsection shall be apportioned as follows: forty percent (40%) of such sum shall be distributed to the various counties in that proportion which the county road mileage of each county bears to the entire state road mileage as certified by the Transportation Commission and the remaining sixty percent (60%) of such sum shall be distributed to the various counties on the basis which the population and area of each county bears to the total population and area of the state. The population shall be as shown by the last Federal Census or the most recent annual estimate provided by the United States Bureau of the Census. The funds shall be used for the purpose of constructing and maintaining county highways, provided, however, the county treasurer may deposit so much of the funds in the sinking fund as may be necessary for the retirement of interest and annual accrual of indebtedness created by the issuance of county or township bonds for road purposes. Such deposits to the sinking fund shall not exceed forty percent (40%) of the funds allocated to a county pursuant to this paragraph.

F. 1. The following percentages of the monies referred to in subsection A of this section shall be remitted to the county treasurers of the respective counties and by them deposited in a separate special revenue fund to be used by the county commissioners in accordance with paragraph 2 of this subsection:

a. from October 1, 2000, until June 30, 2001, two and fifty-three one-hundredths percent (2.53%),

b. for the year beginning July 1, 2001, and ending June 30, 2002, two and fifty-six one-hundredths percent (2.56%), and

c. for the year beginning July 1, 2002, and all subsequent years, two and fifty-nine one-hundredths percent (2.59%).

2. The monies apportioned pursuant to subparagraphs a through c of paragraph 1 of this subsection shall be used for the primary purpose of matching federal funds for the construction of federal aid projects on county roads, or constructing and maintaining county or township highways and permanent bridges of such counties. The distribution of monies apportioned by this paragraph shall be made upon the basis of the current formula based upon road mileage, area and population as related to county road improvement and maintenance costs. Provided, however, the Department of Transportation may update the formula factors from time to time as necessary to account for changing conditions.

G. 1. The following percentages of the monies referred to in subsection A of this section shall be transmitted by the Tax Commission to the various counties as set forth in paragraph 2 of this subsection:

a. from October 1, 2000, until June 30, 2001, three and fifty-five one-hundredths percent (3.55%),

b. for the year beginning July 1, 2001, and ending June 30, 2002, three and fifty-nine one-hundredths percent (3.59%), and

c. for the year beginning July 1, 2002, and all subsequent years, three and sixty-two one-hundredths percent (3.62%).

2. The monies apportioned pursuant to subparagraphs a through c of paragraph 1 of this subsection shall be transmitted to the various counties on the basis of a formula to be developed by the Department of Transportation. Such formula shall be similar to that currently used for the distribution of County Bridge Program Funds, but also taking into consideration the effect of terrain and traffic volume as related to county road improvement and maintenance costs. Provided, however, the Department of Transportation may update the formula factors from time to time as necessary to account for changing conditions. The funds shall be transmitted to the various county treasurers to be deposited in the county highway fund of their respective counties.

H. 1. The following percentages of the monies referred to in subsection A of this section shall be apportioned to the various counties as set forth in paragraph 2 of this subsection:

a. from October 1, 2000, until June 30, 2001, eighty-one one-hundredths percent (0.81%),

b. for the year beginning July 1, 2001, and ending June 30, 2002, eighty-two one-hundredths percent (0.82%), and

c. for the year beginning July 1, 2002, and all subsequent years, eighty-three one-hundredths percent (0.83%).

2. The monies apportioned pursuant to subparagraphs a through c of paragraph 1 of this subsection shall be apportioned to the various counties as follows:

a. each county shall receive the same amount of funds as such county received from the taxes and fees provided for in the 1985 fiscal year, and

b. any funds remaining unallocated following the allocation provided in subparagraph a of this paragraph shall be apportioned to the various counties based upon the proportion that each county's population bears to the total state population.

Each county's allocation of funds shall be remitted to the various county treasurers to be deposited in the general fund of the county and used for the support of county government.

I. 1. The following percentages of the monies referred to in subsection A of this section shall be apportioned to the various cities and incorporated towns as set forth in paragraph 2 of this subsection:

a. from October 1, 2000, until June 30, 2001, three and four one-hundredths percent (3.04%),

b. for the year beginning July 1, 2001, and ending June 30, 2002, three and eight one-hundredths percent (3.08%), and

c. for the year beginning July 1, 2002, and all subsequent years, three and ten one-hundredths percent (3.10%).

2. The monies apportioned pursuant to subparagraphs a through c of paragraph 1 of this subsection shall be apportioned to the various cities and incorporated towns based upon the proportion that each city or incorporated town's population bears to the total population of all cities and incorporated towns in the state. Such funds shall be remitted to the various county treasurers for allocation to the various cities and incorporated towns. All such funds shall be used for the construction, maintenance, repair, improvement and lighting of streets and alleys. Provided, however, the governing board of any city or town may, with the approval of the county excise board, transfer any surplus funds to the general revenue fund of such city or town whenever an emergency requires such a transfer.

J. The following percentages of the monies referred to in subsection A of this section shall be remitted to the State Treasurer to be credited to the Oklahoma Law Enforcement Retirement Fund:

1. From October 1, 2000, until June 30, 2001, one and twenty-two one-hundredths percent (1.22%);

2. For the year beginning July 1, 2001, and ending June 30, 2002, one and twenty-three one-hundredths percent (1.23%); and

3. For the year beginning July 1, 2002, and all subsequent years, one and twenty-four one-hundredths percent (1.24%).

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K. Three one-hundredths of one percent (3/100 of 1%) of the monies referred to in subsection A of this section shall be remitted to the State Treasurer to be credited to the Wildlife Conservation Fund. Seventy-five percent (75%) of the funds shall be used for fish habitat restoration and twenty-five percent (25%) of the funds shall be used in the fish hatchery system for fish production.

L. 1. For the year beginning July 1, 2007, and ending June 30, 2008, five percent (5%) of monies referred to in subsection A of this section shall be remitted to the State Treasurer to be credited to the County Improvements for Roads and Bridges Fund as created in Section 7 of this act.

2. For the year beginning July 1, 2008, and ending June 30, 2009, ten percent (10%) of monies referred to in subsection A of this section shall be remitted to the State Treasurer to be credited to the County Improvements for Roads and Bridges Fund as created in Section 7 of this act.

3. For the year beginning July 1, 2009, and all subsequent years, fifteen percent (15%) of monies referred to in subsection A of this section shall be remitted to the State Treasurer to be credited to the County Improvements for Roads and Bridges Fund as created in Section 7 of this act.

M. Monies allocated to counties by this section may be estimated by the county excise board in the budget for the county as anticipated revenue to the extent of ninety percent (90%) of the previous year's income from such source, provided, not more than fifteen percent (15%) can be encumbered during any month.

N. In no event shall the monies apportioned pursuant to subsections B, E, F, G, H, I and L of this section be less than the monies apportioned in the previous fiscal year.

O. Notwithstanding any other provisions of this section, for the fiscal year beginning July 1, 2003, the first One Hundred Thousand Dollars ($100,000.00) of the monies collected or received by the Tax Commission pursuant to the registration of motorcycles and mopeds in this state shall be placed to the credit of the Oklahoma Tax Commission Revolving Fund.

Section 1104.1. University or college supporter license plate fees - Adoptive Grant Program for Oklahomans with Mental Retardation - Revolving fund - Annual report - Audit.

A. Twenty-three Dollars ($23.00) of the fee authorized by Section 14 of this act for university or college supporter license plates which are received each year by the Oklahoma Tax Commission or its motor license agents shall be apportioned as follows:

1. Twenty Dollars ($20.00) of the fee for each license plate designating a particular state university or college shall be apportioned to the particular state university or college so designated on the license plate. Twenty Dollars ($20.00) of the fee for each license plate designating a particular private university or college shall be apportioned to the particular private university or college so designated on the license plate and may be used by the private university or college as compensation for use of the symbols, words, or

letters authorized by the private university or college for use on the license plate; and

2. Three Dollars ($3.00) shall be deposited to the Adaptive Grant Program for Oklahomans with Mental Retardation Revolving Fund created by this section to be used for educational purposes.

B. There is hereby created in the State Treasury a revolving fund for the Department of Human Services to be designated the "Adaptive Grant Program for Oklahomans with Mental Retardation Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all funds deposited therein pursuant to the provisions of paragraph 2 of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Department of Human Services for the administration of the Adaptive Grant Program for Oklahomans with Mental Retardation.

C. The Department of Human Services is hereby directed to promulgate rules to create the Adaptive Grant Program for Oklahomans with Mental Retardation Program to provide financial assistance in adaptation of furnishings, fixtures, vehicles, equipment or structures in order to meet any special needs of Oklahomans with mental retardation; provided, recipients of grants awarded pursuant to the program shall be limited to those programs, projects or persons not otherwise qualifying for state or federal funding. The Department of Human Services is authorized to contract with a statewide private, nonprofit foundation certified to

be a 501(c)(3) organization by the Internal Revenue Service for administration of the program.

D. On or before January 1, 1991, and each year thereafter:

1. The Department of Human Services shall prepare an annual report on the Program; and

2. The State Auditor and Inspector shall conduct an audit of the funds of the Program.

Such report and audit shall be submitted to the Governor, the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

Section 1104.2. Environmental Education Revolving Fund.

A. Twenty-four Dollars ($24.00) of the fee authorized by Section 14 of this act for environmental awareness license plates which are received each year by the Oklahoma Tax Commission or its motor license agents shall be deposited to the Environmental Education Revolving Fund created by this section.

B. There is hereby created in the State Treasury a revolving fund for the Department of Environmental Quality to be designated the "Environmental Education Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all funds deposited therein pursuant to the provisions of subsection A of this

section. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Department of Environmental Quality for environmental education programs.

Section 1104.3. Agricultural awareness special license plate fee – Ag in the Classroom Education Revolving Fund.

A. Twenty-four Dollars ($24.00) of the fee authorized by Section 14 of this act for Agricultural Awareness license plates shall be deposited to the Ag in the Classroom Education Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the State Department of Agriculture to be designated the "Ag in the Classroom Education Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Department pursuant to the provisions of subsection A of this section. All monies accruing to the credit of such fund are hereby appropriated and may be budgeted and expended by the Department for the purpose of Ag in the Classroom Education Program. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.4. OSU Extension Service License Plate Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 14 of this act for Four-H license plates shall be deposited in the OSU Extension Service License Plate Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for Oklahoma State University Extension Service to be designated the "OSU Extension Service License Plate Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Oklahoma State University Extension Service pursuant to the provisions of Section 14 of this act. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Oklahoma State University Extension Service for the purpose of expenses related to agricultural programs for youth. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.5. Special license plate fee – Urban Forestry and Beautification Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 14 of this act for Urban Forestry and Beautification license plates shall be deposited to the Urban Forestry and Beautification Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Forestry Division of the State Department of Agriculture to be designated "Urban Forestry and Beautification Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Department pursuant to the provisions of paragraph 1 of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Division for the purpose of contracting with or providing grants to nonprofit organizations that develop and operate programs to encourage urban forestry and beautification. Such organizations may apply to the Department for grants to be paid from the fund, or the Department may solicit bids for contracts for particular services related to urban forestry and beautification to be paid from the fund. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.6. Choose Life Assistance Program Revolving Fund – Applications for funds – Restrictions on use of funds.

A. Twenty Dollars ($20.00) of the fee authorized by Section 14 of this act for Choose Life license plates shall be deposited to the Choose Life Assistance Program created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Department of Human Services to be designated the Choose Life Assistance Program. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all the monies received by the Department of Human Services pursuant to the provisions of Section 14 of this act. All monies accruing to the credit of the fund are appropriated and shall be distributed at the beginning of each fiscal year in a pro rata share to all nonprofit organizations that provide services to the community that include counseling and meeting the physical needs of pregnant women who are committed to placing their children for adoption. Any unused funds in excess of ten percent (10%) of the funds allocated to a nonprofit organization shall be returned to the Choose Life Assistance Program Revolving Fund at the end of the fiscal year to be aggregated and distributed with the next fiscal year distribution.

C. To apply for and receive the funds available through the Choose Life Assistance Program, an organization must deliver to the Department of Human Services an affidavit signed by a duly appointed representative of the organization that states the following:

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1. The organization is a nonprofit organization;

2. The organization does not discriminate for any reason, including, but not limited to, race, marital status, gender, religion, national origin, handicap or age;

3. The organization counsels pregnant women who are committed to placing their children for adoption;

4. The organization is not involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising;

5. The organization does not charge women for any services received;

6. The organization understands that sixty percent (60%) of the funds received by an organization can only be used to provide for the material needs of pregnant women who are committed to placing their children for adoption, including clothing, housing, medical care, food, utilities, and transportation. Such funds may also be expended on infants awaiting placement with adoptive parents.

Forty percent (40%) of the funds may be used for adoption, counseling, training, or advertising, but may not be used for administrative expenses, legal expenses, or capital expenditures.

7. The organization understands that no funds may be used for administrative expenses, legal expenses, or capital expenditures;

8. The organization understands that any unused funds at the end of the fiscal year that exceed ten percent (10%) of the funds received by the organization during the fiscal year must be returned to the Choose Life Assistance Program Revolving Fund to be aggregated and distributed with the next fiscal year distribution; and

9. The organization understands that each organization that receives such funds must submit to an annual audit of such funds verifying that the funds received were used in the manner prescribed by statute.

D. Funds may not be distributed to any organization that is involved or associated with abortion activities, including counseling for or referral to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising, and funds may not be distributed to any organization that charges women for services received.

E. Sixty percent (60%) of the funds received by an organization can only be used to provide for the material needs of pregnant women who are committed to placing their children for adoption, including clothing, housing, medical care, food, utilities, and transportation. Such funds may also be expended on infants awaiting placement with adoptive parents. Forty percent (40%) of the funds may be used for adoption, counseling, training, or advertising, but may not be used for administrative expenses, legal expenses, or capital expenditures.

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F. Each organization that receives funds must submit to an annual audit of such funds verifying that the funds received were used in the manner prescribed in this section.

Section 1104.7. Future Farmers of America special license plate - Fee.

A. Twenty Dollars ($20.00) of the fee authorized by Section 14 of this act for Future Farmers of America license plates shall be deposited to the Oklahoma Department of Career and Technology Education Agriculture Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Oklahoma Department of Career and Technology Education to be designated the "Oklahoma Department of Career and Technology Education Agriculture Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Department pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Department for the purpose of funding programs and services to encourage students to consider agriculture as a career choice. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.8. Color Oklahoma Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 1135.5 of this title for Color Oklahoma license plates shall be deposited to the Color Oklahoma Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Oklahoma Native Plant Society to be designated the "Color Oklahoma Revolving Fund" and administered by the Oklahoma Department of Tourism and Recreation. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Oklahoma Department of Tourism and Recreation pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Oklahoma Department of Tourism and Recreation pursuant to a contract with the Oklahoma Native Plant Society for the purpose of preserving and planting wildflowers and native plants in Oklahoma and promoting wildflower heritage through education. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.9. Oklahoma Central Cancer Registry Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 14 of this act for Fight Cancer license plates shall be deposited to the Oklahoma Central Cancer Registry Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the State Department of Health to be designated the "Oklahoma Central Cancer Registry Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the State Department of Health pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the State Department of Health for the implementation of the Oklahoma Central Cancer Registry. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.10. Animal Friendly Revolving Fund.

A. The fee authorized by Section 14 of this act shall be deposited to the Animal Friendly Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Oklahoma Department of Agriculture, Food, and Forestry to be designated the "Animal Friendly Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Department pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Oklahoma Department of Agriculture, Food, and Forestry for the purpose of contracting with or providing grants to organizations of veterinary clinics that develop and operate programs that provide dog or cat spaying and neutering services and nonprofit organizations that provide shelter to unwanted stray dogs and cats. Such organizations may apply to the Department for grants to be paid from the fund. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.11. Patriot License Plate Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 1135.5 of Title 47 of the Oklahoma Statutes for the Patriot License Plate shall be deposited in the Patriot License Plate Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Military Department of Oklahoma to be designated the "Patriot License Plate Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Military Department of Oklahoma pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Military Department of Oklahoma for any deployment-related purpose for Oklahoma residents who are members of the Oklahoma National Guard. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.12. Oklahoma Quarter Horse Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 1135.5 of Title 47 of the Oklahoma Statutes for the Oklahoma Quarter Horse License Plate shall be deposited in the Oklahoma Quarter Horse Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Oklahoma Horse Racing Commission to be designated the "Oklahoma Quarter Horse Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Oklahoma Horse Racing Commission pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Oklahoma Horse Racing Commission for the support of any statewide organization dedicated to promoting the American Quarter Horse in Oklahoma through sharing information, events, and activities for the amateur, youth, and professional horsemen. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.13. Oklahoma Zoological Society Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 1135.5 of Title 47 of the Oklahoma Statutes for Oklahoma City Zoo license plates shall be deposited to the Oklahoma Zoological Society Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Department of Wildlife Conservation to be designated the "Oklahoma Zoological Society Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Department of Wildlife Conservation pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Department of Wildlife Conservation for grants to the Oklahoma Zoological Society for the purpose of contributing to an understanding and preservation of the earth's natural resources through positive recreational and educational experiences and conducting and participating in scientifically-based conservation programs that benefit animal and plant communities. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.14. Oklahoma Prevent Birth Defects, Premature Birth and Infant Mortality Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 1135.5 of Title 47 of the Oklahoma Statutes for the Oklahoma March of Dimes license plate shall be deposited to the Oklahoma Prevent Birth Defects, Premature Birth and Infant Mortality Fund established in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund to be designated the "Oklahoma Prevent Birth Defects, Premature Birth and Infant Mortality Fund" and administered by the State Department of Health. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all the monies received by the State Department of Health pursuant to the provisions of Section 1135.5 of this title. All monies accruing to the credit of the fund are appropriated and may be budgeted and expended by the State Department of Health at the beginning of each fiscal year for the purpose of providing grants to the Oklahoma Chapter of March of Dimes for purposes of preventing birth defects, premature birth and infant mortality. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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Section 1104.15. Oklahoma Association for the Deaf License Plate Revolving Fund.

A. Twenty Dollars ($20.00) of the fee authorized by Section 1135.5 of Title 47 of the Oklahoma Statutes for the Oklahoma Association for the Deaf License Plate shall be deposited in the Oklahoma Association for the Deaf License Plate Revolving Fund created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Department of Rehabilitation Services to be designated the "Oklahoma Association for the Deaf License Plate Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Department of Rehabilitation Services pursuant to the provisions of subsection A of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Department of Rehabilitation Services to promote the interests of the deaf and to advance the social, educational, cultural, and economic well being of the deaf. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

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No. 07-297

FILED

OCT 09 2007

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

HAROLD E. HILL, MARGARET R. and WILLIAM F. McCRIGHT, JOHN J. McQUEEN, RITA J. MOSKOWITZ, and BARBARA SANTEE,

Petitioners,

vs.

THOMAS E. KEMP (Chairman, Oklahoma Tax Commission), JERRY JOHNSON (Vice Chairman, Oklahoma Tax Commission), CONNIE IRBY (Secretary-Member, Oklahoma Tax Commission), and BRAD HENRY (Governor),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OKLAHOMA GOVERNOR BRAD HENRY'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners are Harold E. Hill, Margaret R. and William F. McCright, John J. McQueen, Rita J. Moskowitz, and Barbara Santee, all plaintiff-appellants in the proceedings below.

Respondents/Cross-Petitioners are Thomas E. Kemp, Jerry Johnson, Connie Irby (respectively, the Chairman, Vice-Chairman and Secretary-Member of Oklahoma Tax Commission), and Brad Henry (Governor of the State of Oklahoma), all defendants-appellees in the proceedings below sued in their official capacities.

Respondents/Cross-Petitioners, herein, are joined by Howard H. Hendrick (Director of the Oklahoma Department of Human Services) as a Conditional Cross-Petitioner.

Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC"), a plaintiff-appellant in proceedings below, apparently does not seek further review of any of the decisions issued below with respect to its claims, which they claim are distinct and severable from petitioners' claims, however, Respondents herein seek to join them on a conditional cross-petition if this court grants Petitioners' Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No Respondent/Cross-Petitioner is a corporation. Cross-Respondent, Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. claims to be a non-profit organization established under § 501(c)(3) of the Internal Revenue Code.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 478 F.3d 1236 (10th Cir. 2007) and reproduced as Appendix A (1a-53a) in Petitioners' Petition for Writ of Certiorari. The unpublished opinion and order of the district court, No. 04-CV-0028 (N.D. Okl. August 16, 2005) is reproduced as Appendix B (54a-71a) to Petitioners' Petition for Writ of Certiorari.

JURISDICTION

The court of appeals entered judgment on March 6, 2007, and a timely-filed petition for rehearing and rehearing *en banc* was denied on April 2, 2007. (See Petitioners' Petition for Writ of Certiorari, App. C, 72a-73a). On June 14, 2007, Justice Breyer extended Petitioners' time within which to file a petition for *certiorari* to and including August 30, 2007. Pursuant to Supreme Court Rule 12(5) Respondents are filing this Response to that Petition for Certiorari and Conditional Cross-Petition within 30 days from the date this case was placed on the docket. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and

efficient remedy may be had in the courts of such State." Petitioners' App. D, 74a.

The challenged tax scheme, 47 O.S. §§ 1104 through 1136, is reproduced in Appendix A, to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners, all Oklahoma taxpayers claiming ownership in motor vehicles registered in the State of Oklahoma, filed their First Amended Complaint on August 19, 2004, complaining that Oklahoma's motor vehicle license plate statutes violate their Constitutional rights. (App. pg. 1-59). Collectively calling themselves "Motorist," they alleged in their First Amended Complaint that they "interpret the phrase 'choice in family planning' to mean a woman's freedom to choose among all available reproductive options both before and after conception." (App. pg. 6, para. 16). They further alleged:

> 17. Motorist Plaintiffs wish to express themselves in this manner because they believe a special license plate is a unique means of promoting their views about reproductive rights.
>
> 18. Motorist Plaintiffs also seek a special license plate expressing support for choice in family planning because other motorists are currently permitted to use special license plates to (*a*) express contrary views about

> reproductive rights, and (*b*) raise money for organizations promoting those contrary views. (App. pg. 6).

They brought this action pursuant to 42 U.S.C. § 1983 alleging four claims:

Claim One, alleges Oklahoma's statutes, violate their First and Fourteenth Amendment rights because they are "presumptively unconstitutional" in that it grants both "the Oklahoma Legislature and Governor unbridled discretion and lacks viewpoint neutral standards for determining which Oklahoma motorist will be permitted access to a State-created speech forum" and that "every application of the Statutory Scheme creates an impermissible risk that viewpoint discrimination will lead to suppression of protected expression." (App. pg. 53);

Claim Two, alleges the statutes violate their First and Fourteenth Amendment rights "because the Oklahoma Legislature engaged in viewpoint discrimination when it authorized the expression of only certain views about reproductive rights in a State-created speech forum" and that "[t]he Statutory Scheme is not narrowly drawn to achieve a compelling or any other governmental interest justifying the Oklahoma Legislature's failure to amend [the statutes] to allow the [Oklahoma Tax Commission] to issue Family Planning Plates." (App. pg. 54);

Claim Three, alleges the statutes violate the Motorists' Due Process protection accorded by the Fourteenth Amendment because they "condition access of

Oklahoma motorists to a State-created speech forum on a statutory amendment by the Oklahoma Legislature and Governor authorizing the desired self-expression" again claiming the statutes are not narrowly drawn to achieve a compelling governmental interest, and that "it does not adequately notify Oklahoma motorists of what, if any, additional self-expression would be permitted or prohibited in a State-created speech forum." (App. pg. 54-55);

Claim Four, alleges the statutes violate the Equal Protection Clause of the Fourteenth Amendment "because it allows for, and in fact has resulted in, impermissible viewpoint discrimination among otherwise similarly-situated Oklahoma motorists in permitting access to a State-created speech forum" and that the statutes are not narrowly drawn to achieve a compelling or any other governmental interest justifying a distinction between allowing certain Oklahoma motorists to express themselves on special license plates and refusing to allow other Oklahoma motorists to do the same." (App. pg. 55-56).

The Motorists requested the district court grant them declaratory and injunctive relief. (App. pg. 57-58).

Petitioners were joined in their lawsuit by an organization called Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC"), a non-profit organization established under § 501(c)(3) of the Internal Revenue Code. (App. pg. 6-8). They have not asked this Court for Certiorari review

because the Tenth Circuit remanded their claims (i.e., Claims Five and Six) back to the district court for further determination. (Petitioners' App. pg. 36a-53a). Respondent/Cross-Petitioners join them in this Appeal on Conditional Cross-Petition (filed separately) asking this Court to review the Tenth Circuit's decision regarding ORC's claims.

ORC claims to be "a statewide coalition of Christian, Jewish, and other religious organizations supporting choice in family planning, regardless of income, culture, race, class, gender or ethnic origin." (App. pg. 7, para. 22). Like the Motorists, ORC alleged they "interpret the phrase 'choice in family planning' to mean a woman's freedom to choose, according to her own faith, traditions or religious and moral beliefs, among all available reproductive options both before and after conception." (App. pg. 7, para. 23). ORC claims it "provides various services to assist pregnant women who wish to engage in choice in family planning." (App. pg. 7, para. 24). They also claim to "engage in various activities to express support for choice in family planning," and that they "would like to apply for funding pursuant to 47 O.S. § 1104.6 to (a) create a program that would provide direct support to pregnant women who have decided that adoption is the appropriate option given their circumstances, and (b) support counseling and associated training about adoption as a family planning option." (App. pg. 8, para. 28). ORC alleges under:

Claim Five, that Oklahoma's tax funding part of the state license plate scheme "violates the First and Fourteenth Amendments . . . by impermissibly denying [them] the ability to apply for and receive money from the Choose Life Fund solely on the basis of [their] involvement and association – through other funding sources – with abortion activities." (App. pg. 56).

Claim Six, alleges that the funding statute "violates [their] Equal Protection" rights "because it allows for, and in fact has resulted in, impermissible discrimination among otherwise similarly-situated non-profit organizations regarding their eligibility for disbursements from the Choose Life Fund." (App. pg. 57).

ORC also asked the Court for declaratory and injunctive relief. (App. pg. 57-58).

All of the Defendants moved to dismiss the First Amended Complaint on a variety of grounds, including, lack of venue, Eleventh Amendment immunity, lack of ripeness, lack of standing, failure to state claims upon which relief could be granted, and the Tax Injunction Act. On August 16, 2005, the district court issued an Opinion and Order dismissing the First Amended Complaint holding that it lacked jurisdiction pursuant to the Tax Injunction Act [28 U.S.C. § 1341] to decide Plaintiffs' First Amended Complaint. (Petitioners App. B). Plaintiffs then appealed to the Tenth Circuit.

In the interim, between the time when the district court rendered its judgment and the time before

the Tenth Circuit entered its decision, the Oklahoma Legislature (with the Governor's approval), enacted 47 O.S. § 1135.7 which now allows any motorist (including Petitioners) the opportunity to express any viewpoint on a special license plate under certain conditions and to fund initiatives that support their viewpoint (possibly including abortion rights). (Petitioners App. A, pgs. 136a-139a). This fact alone, may render Petitioners' claims moot.

The Tenth Circuit's Decision

The Tenth Circuit affirmed the district court's decision regarding the Motorists' claims – one through four, but remanded ORC's claims five and six to the district court for further determination, ruling the district court improperly applied the *Ex parte Young* doctrine pursuant to this Court's decision in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). (Petitioners' App. A).

PETITIONERS AND ORC's CLAIMS

Both the Motorists and ORC are challenging the same statutes. The Motorists are asking for the same access to what they categorize as a state created forum in order to express their viewpoint on the State's license plates. While ORC is challenging the funding part of that statute, demanding the federal courts to force the state to expend state tax money for a program the State has decided is not in the best

interests of its citizens. Both claims raise serious *federalism* concerns. Because both are challenging the same statutory scheme Respondents are asking this Court to accept its Cross-Petition conditioned on this Court's acceptance of Petitioners' Writ for Certiorari.

RESPONSE TO PETITION FOR CERTIORARI

Petitioners claim this Court should accept Certiorari review because the price paid by motorists for Oklahoma license plates is not really a tax, but instead a contractual debt, and because the Tax Injunction Act should not deprive a federal district court of jurisdiction when the claimants are not challenging the tax itself, but instead challenging the statute on free speech grounds.

1. Tax vs. Debt and the Tax Injunction Act

Petitioners want this Court to define for the state what it considers a tax. While Respondents understand that it is this Court's obligation to interpret Congress' intent in enacting the Tax Injunction Act, and not what the State itself classifies as a tax, Respondents believe the State's intent should not be wholly discounted.

The purpose of taxation is to provide funds or property with which to promote the general welfare and protection of its citizens. *Burnet v. Sanford &*

Brooks Co., 282 U.S. 359, 51 S.Ct. 150 (1931). Petitioners' argument that the revenue produced by Oklahoma's vehicle license plate statutes is not really a "tax" but instead a "contractual debt" ignores the purpose for which the revenue is gathered. The revenue appropriated from those assessments fund a myriad of state programs including school districts, State Transportation, counties, cities and towns, Oklahoma's Law Enforcement Retirement Fund, and Oklahoma's Wildlife Conservation Fund. See, 47 O.S. § 1104. Even the two appropriations that the Petitioners are complaining about in this case serve the general welfare and protection of its citizens. Both the $20 apportioned for the Choose Life Assistance Program pursuant to 47 O.S. § 1104.6(B), and the $25 appropriated for the Investing in the Stronger Oklahoma Families Act pursuant to 47 O.S. § 1135.5(B)(22) and 10 O.S. § 22.2(B) are valid state appropriations that "promote the general welfare and protection of its citizens." *Id.* Just because the State originally chose not to fund Petitioners' particular viewpoint programs does not invalidate those appropriations (*Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 1773, 114 L.Ed.2d 233 (1991)) or change the revenue's character. Because those funds are appropriated for valid State purposes that are generally accepted as being funded through state taxes, this Court should hold they are, in fact, taxes for the purpose of the Tax Injunction Act, and, therefore, Petitioners' constitutional challenge to that tax statute is prohibited by the Tax Injunction Act.

2. Free Speech and the Tax Injunction Act

A reading of Petitioners' First Amended Complaint seems to reveal that what the Motorists are really complaining about is not the denial of their free speech, but rather their failed attempts in lobbying the State Legislature for their particular viewpoint on the State's license plates. (See App. pg. 43, para. 111-124). Having failed in the political arena, they are now attempting to deny the state of Oklahoma its sovereign right to tax and appropriate state funds for the general welfare and protection of its citizens by asking a federal court to declare Oklahoma's tax statutes unconstitutional. If the Petitioners are asking this Court to invade the State's political arena to determine the propriety of the Legislatures' and Governor's actions in first approving only one viewpoint in the abortion/pro-life debate, but then later allowing Petitioners' viewpoint as well, but based on different criteria, then such "political question" could raise serious issues of *federalism*, because the state as a sovereign entity enjoys political autonomy and wide discretion on issues of government speech (*Johanns v. Livestock Marketing Association*, 544 U.S. 550, 125 S.Ct. 2055, (2005)), on state spending (*Diamler Chrysler Corp. v. Cuno*, ___ U.S. ___, 126 S.Ct. 1854 (2006)) and the regulation of it's citizens' health. (*Gonzales v. Oregon*, ___ U.S. ___, 126 S.Ct. 64, 163 L.Ed.2d 728 (2006)).

The state has in no way attempted to silence Petitioners from any speech related activity. They are still free to place their viewpoint on any bumper

stickers they desire. Indeed, they could paint their entire car with slogans and/or viewpoint speech if they so desired. The state is merely advocating a particular viewpoint which its current political electorate have determined to be favored. (See *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 1773, 114 L.Ed.2d 233 (1991) ("[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program")). The State has not forced the Petitioners to purchase the "Choose Life" or "Adoption Creates Families" license plates (*Johanns v. Livestock Marketing Association*, 544 U.S. 550, 125 S.Ct. 2055 (2005)), and there is no "speech-based restriction as its sole rationale and operative principle" in this case. *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 834, 115 S.Ct. 2510 (1995). The state of Oklahoma has merely advocated a particular viewpoint that happens to be contrary to Petitioners' viewpoint. *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 1773, 114 L.Ed.2d 233 (1991) ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect."); *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 125 S.Ct. 2055 (2005) ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech").

This Court has held that "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and implement that judgment by the allocation of public funds for medical services relating to childbirth but not to those relating to abortion." *Rust,* at 175, citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 510, 109 S.Ct. 3040, 3052 (1989). As such, Oklahoma's Legislature and Governor in first allowing only the "Choose Life" and "Adoption Creates Families" license plates, but then (later) allowing any other license plates, including Petitioners' viewpoint on license plates based on different criteria is not unconstitutional nor unduly restrictive. The State's different criteria in fact represents a legitimate governmental interest, i.e., the increased costs associated with designing and producing new association or viewpoint license plates.

Finally, this Court has already held that there is no "special exception for taxpayers raising First Amendment claims" under the Tax Injunction Act because such "would undermine significantly Congress' primary purpose to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 417, 102 S.Ct. 2498, 2512 (1982), quoting *Rosewell v. LaSalle National Bank*, 450 U.S., at 522, 101 S.Ct., at 1233. The Tax Injunction Act prevents a federal district court from not only issuing injunctions, but

also from declaring state taxing statutes unconstitutional, "because there is little practical difference between injunctive and declaratory relief." *Grace Brethren,* 457 U.S. at 408, 102 S.Ct., at 2508.

For the aforementioned reasons, this Court should deny Petitioners' Certiorari review.

CONCLUSION

This Court should deny Petitioners' Petition for Certiorari because the Tenth Circuit's decision that the Tax Injunction Act denied the district court jurisdiction to hear their claims was correct. In the event this Court does grant that Petition, then Respondents' request this Court to also grant their Cross-Petition because the Tenth Circuit's decision concerning *Ex parte Young* was not exactly correct,

and that court should have dismissed ORC's claims as well.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

HAROLD E. HILL, MARGARET R. and WILLIAM F. MCCRIGHT, JOHN J. McQUEEN, RITA J. MOSKOWITZ, BARBARA SANTEE, and OKLAHOMA RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE EDUCATION FUND, INC., Plaintiffs, vs. THOMAS E. KEMP, Chairman, Oklahoma Tax Commission; JERRY JOHNSON, Vice Chairman, Oklahoma Tax Commission; CONNIE IRBY, Secretary-Member, Oklahoma Tax Commission; ROBERT BUTKIN, Treasurer, Oklahoma State Treasury; HOWARD H. HENDRICK, Director, Oklahoma Department of Human Services; BRAD HENRY, Governor of the State of Oklahoma; and W.A. DREW EDMONDSON, Attorney General of the State of Oklahoma, Defendants.	Civil Case No. 04 CV 028 EA(C) **FIRST AMENDED COMPLAINT** (Filed Aug. 19, 2004)

Plaintiffs, by and through their undersigned attorneys, bring this First Amended Complaint against the above-named defendants and their employees, agents, and successors in office, and in support thereof allege the following:

I. INTRODUCTION

1. This action is brought under 42 U.S.C. § 1983 seeking declaratory and injunctive relief for violations of rights secured by the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiffs challenge the constitutionality of certain Oklahoma statutes involving "special license plates."

2. The challenged statutes infringe plaintiffs' exercise of free speech and the protections accorded by both the Due Process and Equal Protection Clauses because those statutes: (*a*) permit viewpoint discrimination in the issuance of special license plates, a State-created forum for private speech (First through Fourth Claims for Relief); and (*b*) deny government funding to otherwise eligible recipients solely on the basis of protected speech activities (Fifth and Sixth Claims for Relief).

3. The protected speech at issue in this litigation involves plaintiffs' views about reproductive rights. Specifically, plaintiffs' injuries arise from their desire to express support for choice in family planning (*i.e.*, support for abortion as one of multiple

options available to women with unplanned pregnancies).

B [sic]. **Unconstitutional Viewpoint Discrimination**

4. Through the challenged statutes, the Oklahoma Legislature and Governor created a forum for private speech by allowing Oklahoma motorists to purchase from the State of Oklahoma certain special license plates for the display of self-expression. New special license plates – those displaying different expression than that already authorized by statute – can be issued only by legislative amendment. The standardless process by which motorists are granted access to this State-created forum creates the potential for unconstitutional viewpoint discrimination.

5. Indeed, the motorist plaintiffs in this action are already victims of viewpoint discrimination because the challenged statutes have not been amended to authorize the issuance of a special license plate displaying their desired expression – notwithstanding that Oklahoma motorists are currently permitted to, purchase two different special license plates displaying contrary expression (*i.e.*, support for adoption at the exclusion of all other reproductive options available to women with unplanned pregnancies).

C [sic]. **Unconstitutional Funding Restrictions**

6. Through the challenged statutes, the Oklahoma Legislature and Governor imposed eligibility restrictions on applications for certain funding. Specifically, the challenged statutes provide that monies from additional fees paid by Oklahoma motorists to the State of Oklahoma for the purchase of "Choose Life" special license plates will be available for disbursement only to those organizations that, among other conditions, do not express support for choice in family planning. Accordingly, this restriction impermissibly links the receipt of government benefits with recipients' protected speech activities.

II. JURISDICTION AND VENUE

7. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4).

8. Plaintiffs' claim for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

9. Venue is appropriate in the Northern District of Oklahoma under 28 U.S.C. § 1391(b).

III. PARTIES

A. Motorist Plaintiffs

10. Plaintiff Harold E. Hill is a retired Presbyterian minister and college professor, and he is a resident of Tulsa, Oklahoma. He owns a validly-registered 1993 Chevrolet S-10 pick-up truck.

11. Plaintiffs Margaret R. McCright and William F. McCright are, respectively, a retired teacher/job placement counselor and a retired contractor/petroleum marketer. Mr. and Mrs. McCright are married and reside in Tulsa, Oklahoma. They own validly- and jointly-registered 1980 Chevrolet El Camino and 1991 Chrysler Fifth Avenue passenger cars.

12. Plaintiff John J. McQueen is a retired attorney and certified public accountant, and he is a resident of Tulsa, Oklahoma. He owns a validly-registered 1995 Lincoln Towncar passenger car.

13. Plaintiff Rita J. Moskowitz is a commercial realtor, and she is a resident of Tulsa, Oklahoma. She owns a validly-registered 1994 Chevy Cavalier passenger car.

14. Plaintiff Barbara Santee has a doctoral decree in Sociomedical Sciences and recently retired as the Executive Director of Oklahoma-NARAL Pro-Choice America, and she is a resident of Tulsa, Oklahoma. She owns a validly-registered 1990 Volvo 740GL passenger car.

15. Each of the individuals identified in ¶¶ 10 through 14 above (collectively, the "Motorist Plaintiffs") wishes to purchase and display on his or her motor vehicle a special license plate expressing a view about reproductive rights. Specifically, Motorist Plaintiffs seek a special license plate expressing support for choice in family planning.

16. Motorist Plaintiffs interpret the phrase "choice in family planning" to mean a woman's freedom to choose among all available reproductive options both before and after conception.

17. Motorist Plaintiffs wish to express themselves in this manner because they believe a special license plate is a unique means of promoting their views about reproductive rights.

18. Motorist Plaintiffs also seek a special license plate expressing support for choice in family planning because, other motorists are currently permitted to use special license plates to (*a*) express contrary views about reproductive rights, and (*b*) raise money for organizations promoting those contrary views.

19. Motorist Plaintiffs sue on their own behalf only as to the First through Fourth of the Claims for Relief set forth in ¶¶ 141 through 156 below.

B. Organizational Plaintiff

20. Plaintiff Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC" or

the "Organizational Plaintiff") is a non-profit organization established under § 501(c)(3) of the Internal Revenue Code.

21. ORC is located in Tulsa, Oklahoma. It was founded in 1978 as the Oklahoma affiliate of the former Religious Coalition for Abortion Rights, which is now known as the Religious Coalition for Reproductive Choice.

22. ORC is a statewide coalition of Christian, Jewish, and other religious organizations supporting choice in family planning, regardless of income, culture, race, class, gender or ethnic origin.

23. ORC interprets the phrase "choice in family planning" to mean a woman's freedom to choose, according to her own faith, traditions or religious and moral beliefs, among all available reproductive options both before and after conception.

24. ORC provides various services to assist pregnant women who wish to engage in choice in family planning. For example, ORC provides telephone counseling on all reproductive options available to women with unplanned pregnancies – including parenting, adopting, foster care and abortion. ORC accepts counseling referrals from other organizations and may also refer women to other organizations for counseling. In addition, ORC maintains a Roe Fund to help cover the costs (including child care, travel, overnight accommodations and medical care) incurred by impoverished pregnant

women who have decided that abortion is the appropriate option given their circumstances.

25. ORC does not charge women for any services rendered.

26. ORC also engages in various activities to express support for choice in family planning. For example, on at least a monthly basis, ORC members and volunteers stand as a non-confrontational and peaceful presence outside health facilities providing abortion services. ORC also sponsors periodic worship, fellowship and educational gatherings for community members who wish to express support for choice in family planning. In addition, ORC promotes the Clergy for Choice Network of the Religious Coalition for Reproductive Choice, which is a national registry of clergy of all faiths who believe that family planning encompasses a wide range of issues, including access to safe, legal and affordable adoption and abortion services.

27. ORC would like to apply for funding pursuant to 47 Okla. St. § 1104.6 to (*a*) create a program that would provide direct support to pregnant women who have decided that adoption is the appropriate option given their circumstances, and (*b*) support counseling and associated training about adoption as a family planning option.

28. ORC sues on its own behalf only as to the Fifth through Sixth Claims for Relief set forth in ¶¶ 157 through 162 below.

C. Defendants

29. Defendant Thomas E. Kemp is Chairman of the Oklahoma Tax Commission ("OTC").

30. Defendant Jerry Johnson is Vice-Chairman of the OTC.

31. Defendant Connie Irby is Secretary-Member of the OTC.

32. Together and individually, Defendants Kemp, Johnson and Irby are responsible for supervising the administration and enforcement of, among other statutes, the Oklahoma Vehicle License and Registration Act (Title 47, Chapter 74, §§ 1101 et seq., of the Oklahoma Code) (the "VLRA").

33. Together and individually, Defendants Kemp, Johnson and Irby are responsible for supervising the administration and enforcement of the Statutory Scheme challenged in this lawsuit. These responsibilities include, but are not limited to, issuing special license plates and collecting and apportioning the associated fees.

34. Defendant Robert Butkin is the Oklahoma State Treasurer ("Treasurer"). He is responsible for creating and maintaining the fund associated with the funding restrictions challenged in this lawsuit.

35. Defendant Howard H. Hendrick is the Director of the Oklahoma Department of Human Services ("DHS"). He is responsible for administering

and implementing the funding restrictions challenged in this lawsuit.

36. Brad Henry is the Governor of the State of Oklahoma. He is responsible for the faithful execution of the laws of the State of Oklahoma, including the Statutory Scheme and the funding restrictions challenged in this lawsuit.

37. W.A. Drew Edmondson is the Attorney General of the State of Oklahoma. He is responsible for the enforcement of the laws of the State of Oklahoma, including the Statutory Scheme and the funding restrictions challenged in this lawsuit.

38. Each of the individuals identified in ¶¶ 29 through 37 above, and their employees, agents, and successors in office, (collectively, the "Defendants") is sued in his or her official capacity for his or her actions taken under color of state law.

IV. OKLAHOMA'S OFFICIAL LICENSE PLATES[1]

39. Under Oklahoma law, every motor vehicle must be registered and have a government-issued license plate affixed to the rear bumper. *See generally* 47 Okla. St. § 1113.

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[1] A description of these statutory provisions is offered here – even though they are not challenged in this lawsuit – to provide context for the challenged provisions described elsewhere in the Complaint.

40. Upon information and belief, any Oklahoma motorist is permitted to affix a non-government issued replica or mock license plate to the *front* bumper of his or her motor vehicle. Replica license plates are available for purchase at various retail and government locations. For purposes of this lawsuit, any and all references to license plates mean the government-issued license plates required by law to be affixed to the *rear* bumpers of motor vehicles.

41. Any Oklahoma motorist convicted of operating a motor vehicle without a license plate will be deemed guilty of a misdemeanor and punished by a fine. *See* 47 Okla. St. § 1151(A)(5).

42. Any Oklahoma motorist convicted of altering a license plate in any manner will be deemed guilty of a misdemeanor and punished by a fine. *See* 47 Okla. St. § 1151(A)(2).

43. The OTC is required, upon the filing of an initial registration application and payment of the associated fees, to assign a unique identification number to the motor vehicle described in the application ("Vehicle ID Number"). The OTC is further required to issue the vehicle owner a certificate of registration and one license plate displaying the Vehicle ID Number (an "Official Plate"). *See* 47 Okla. St. § 1113(A)(1).

44. Upon information and belief, Vehicle ID Numbers typically consist of randomly-selected configurations of letters and/or numbers. Oklahoma motorists are also permitted to create their own

Vehicle ID Numbers by purchasing from the OTC personally-selected configurations of letters and/or numbers consisting of seven digits or less. *See* 47 Okla. St. § 1135.4; *see also* ¶ 74 below.

45. Each Oklahoma motorist's Vehicle ID Number is unique regardless of whether it was randomly-selected or personally-selected. Accordingly, no two motorists can have the same Vehicle ID Number.

46. Upon information and belief, Vehicle ID Numbers are displayed on Official Plates to facilitate the identification of motor vehicles. Vehicle identification assists the State of Oklahoma and its employees and agents in the performance of safety, traffic and law enforcement functions.

47. The Official Plate design is prescribed by statute. Official Plates have a solid white background. The top of the plate reads "Oklahoma" in black lettering, and the bottom reads "Native America" in red lettering. The center of the plate displays the same emblem featured on the Oklahoma State flag. The first three digits of the Vehicle ID Number are displayed in green and white to the left of the emblem, and the last three digits are displayed in green and white to the right of the emblem. *See* 47 Okla. St. § 1113(B)(3).

48. Photographs of Official Plates are available online at various internet websites. *See, e.g.*, <http://www.plateshack.com/y2k/Oklahoma/ok2004.jpg>; <http://www.worldlicenseplates.com>. An image of the Official Plate from one such website is attached as Exhibit A.

49. Every Oklahoma motorist is required to timely renew his or her vehicle registration. The OTC is required, upon the filing of a renewal application and payment of the associated fees, to issue the vehicle owner a decal indicating expiration of the renewal period. The decal must then be affixed to the Official Plate that was issued to the motorist upon initial registration. *See* 47 Okla. St. § 1113(A)(1).

50. The fees imposed by the VLRA, including those relating to motor vehicle registration and renewal, are payable to the OTC and thereafter become the property of the State of Oklahoma.

51. The OTC apportions all VLRA fees in fixed percentages among: (*a*) Oklahoma school districts, municipalities, and counties; (*b*) the General Revenue Fund; (*c*) the Oklahoma State Transportation Fund; (*d*) the Oklahoma Law Enforcement Retirement Fund; and (*e*) the Wildlife Conservation Fund. *See* 47 Okla. St. §§ 1104(A)-(K).

V. THE CHALLENGED STATUTES AND RELATED ALLEGATIONS

A. Special License Plates

52. Oklahoma motorists may purchase from the OTC certain government-issued special license plates that must be affixed to the rear of their motor vehicles in lieu of Official Plates.

53. Oklahoma motorists are not required by law to purchase special license plates or to affix special license plates to their motor vehicles.

54. Special license plates substantially differ in appearance from Official Plates. For example, unlike Official Plates, special license plates do not display the words "Native America," nor do they display the emblem featured on the Oklahoma State flag. In addition, the Vehicle ID Numbers displayed on special license plates may be positioned in different locations and/or be of different colors than the Vehicle lD Numbers displayed on Official Plates. Special license plates also typically differ in color from Official Plates.

55. Most importantly, special license plates display words, illustrations and other information that is not displayed on Official Plates. This information constitutes self-expression by Oklahoma motorists.

56. The self-expression displayed on special license plates (and *absent* from Official Plates) neither facilitates the identification of motor vehicles nor assists the State of Oklahoma and its employees and agents in the performance of any safety, traffic and law enforcement functions.

B. <u>The Statutory Scheme</u>

57. The Oklahoma Legislature and Governor, through 47 Okla. St. §§ 1135.1-1135.6, created a

process that authorizes the OTC to issue, upon payment by an Oklahoma motorist of an amount exceeding the amount paid for an Official Plate, any of the special license plates enumerated in §§ 1135.1-1135.6. A copy of 47 Okla. St. §§ 1135.1-1135.6 is attached as Exhibit B (*see* 2004 OK. ALS 504, §§ 10-15 at pp. 6-22, § 22 at p. 24).

58. Pursuant to the process, the OTC May issue a new special license plate (*i.e.*, one that is *not* currently enumerated in §§ 1135.1-1135.6) only after the Oklahoma Legislature, amends §§ 1135.1-1135.6 to authorize issuance of the new special license plate and the Governor signs the amendment into law (or allows it to become law without his signature by not acting upon it for five days).

59. As a result, the process requires prior approval from the Oklahoma Legislature and Governor if an Oklahoma motorist's desired special license plate – and thus the motorist's desired self-expression – is not among those already authorized for issuance by the OTC and enumerated in §§ 1135.1-1135.6.

60. For purposes of this lawsuit, the process described in ¶¶ 57 through 59 above will be referred to as the "Statutory Scheme."

61. As described in detail in ¶¶ 69 through 72 below, the Statutory Scheme currently authorizes the OTC to issue and allows Oklahoma motorists to purchase 105 different special license plates.

62. The Statutory Scheme requires the OTC to discontinue any of the special license plates authorized prior to January 1, 2004 expressing support for a cause, idea, hobby, institution or entity if fewer than 100 of any such plate are [sic] sold to Oklahoma motorists prior to January 1, 2006. With respect to special license plates authorized on or after July 1, 2004 expressing support for a cause, idea, hobby, institution or entity, the Statutory Scheme prohibits the sale of any such plate if the OTC has not received at least 100 prepaid applications within 180 days of the effective date of authorization. *See* §§ 1135.3 & 1135.5.

63. The Oklahoma Legislature prescribed the design of only 7 currently authorized special license plates. The Oklahoma Legislature delegated design of 56 special license plates to private or government entities. The Statutory Scheme is silent as to the design responsibility for the remaining 42 currently authorized special license plates.

64. The additional fees charged for special license plates under the Statutory Scheme are payable to the OTC and thereafter become the property of the State of Oklahoma.

65. The OTC is typically required to deposit at least $8 of every special license plate fee paid by Oklahoma motorists into the Oklahoma Tax Commission Reimbursement Fund (the "OTC Reimbursement Fund") to be used for administration of the VLRA. *See* §§ 1135.1(B), 1135.2(C), 1135.3(C), 1135.5(C) & 1135.6.

66. The Statutory Scheme requires the OTC to deposit prescribed portions of the remainder of special license plate fees for 26 different plates into specified funds maintained by the Treasurer. Monies from those funds may then be distributed to various private and/or government entities. With respect to the remainder of special license plate fees for 6 different plates, the OTC is required to transfer prescribed portions directly to private entities. In all other instances, the Statutory Scheme requires the remainder of each special license plate fee to be apportioned by the OTC pursuant to 47 Okla. St. § 1104 (discussed in ¶ 51 above). *See* §§ 1135.3(C), 1135.5(C) & 1135.6.

C. All Currently Authorized Self-Expression

67. Each of the currently authorized special license plates substantially differs in appearance from Official Plates and reflects one or more of the following four categories of self-expression by Oklahoma, motorists: (*a*) support for a cause, idea or hobby; (*b*) support for an institution, entity or occupation; (*c*) membership in a particular group; and (*d*) vehicle usage. These categories are described in greater detail in ¶¶ 69 through 72 below.

68. Photographs of many of the currently authorized special license plates are available online at various internet websites. *See, e.g.,* <http://www.plateshack.com/y2k/Oklahoma/oky2k.html>; <http://www.worldlicenseplates.com/usa/US_OK2X.html>.

69. *First Category Of Self Expression – Support For A Cause, Idea Or Hobby:* These special license plates allow any Oklahoma motorist to express support for a cause, idea or hobby. A listing of the names of each such plate follows below, together with the associated additional fee and the identity of the designer (where specified):

a) *§ 1135.3(B)(1)*: **Round & Square Dance** (for any person wishing to demonstrate support for round and square dancing; $15 additional fee)

b) *§ 1135.3(B)(6)*: **Balloonists** (for any person wishing to demonstrate support for hot air ballooning in Oklahoma; $15 additional fee)

c) *§ 1135.3(B)(20)*: **West Point 200th Anniversary** (for any person wishing to commemorate 200th anniversary of the founding of U.S. Military Academy at West Point; $15 additional fee; design by West Point Society of Central Oklahoma.)

d) *§ 1135.3(B)(27)*: **Electric Lineman** (for any person wishing to demonstrate support for Oklahoma's electric linemen; $15 additional fee design by Oklahoma Electric Superintendent's Association)

e) *§ 1135.3(B)(31)*: **Organ, Eye and Tissue** (for any person wishing to demonstrate support and increased awareness for organ, eye and tissue donation; $15 additional fee; design by Oklahoma Organ Donor Education and Awareness Program Advisory Council)

f) *§ 1135.5(B)(2)*: **Environmental Awareness** (for any person wishing to demonstrate support for implementing statewide general public environmental education program; $35 additional fee; design by Oklahoma Department of Environmental Quality in consultation with Oklahoma Arts Council)

g) *§ 1135.5(B)(4)*: **Wildlife Conservation** (for any person wishing to demonstrate support for Wildlife Conservation in Oklahoma; $35 additional fee; design by Oklahoma Department of Wildlife in consultation with Oklahoma Arts Council)

h) *§ 1135.5(B)(5)*: **Child Abuse Prevention** (for any person wishing to demonstrate support for prevention of child abuse; $35 additional fee; design by Oklahoma Department of Health-Office of Child Abuse Prevention and Oklahoma Committee to Prevent Child Abuse)

i) *§ 1135.5(B)(7)*: **Oklahoma History** (for any person wishing to demonstrate interest in Oklahoma history; $35 additional fee)

j) *§ 1135.5(B)(8)*: **Historic Route 66** (for any person wishing to honor historic Route 66, also known as the "Mother Road"; $35 additional fee)

k) *§ 1135.5(B)(9)*: **Heart of the Heartland** (for any person wishing to honor the victims of Oklahoma City terrorist bombing attack on April 19, 1995; $35 additional fee)

l) *§ 1135.5(B)(11)*: **Fight Breast Cancer** (for any person wishing to demonstrate support for prevention and treatment of breast cancer in Oklahoma; $35 additional fee)

m) *§ 1135.5(B)(12)*: **Crime Victims Awareness** (for any person wishing to demonstrate awareness of and support for victims of crimes; $35 additional fee design by Oklahoma Crime Victims Centre)

n) *§ 1135.5(B)(15)*: **Agricultural Awareness** (for any person wishing to demonstrate support for Department's Ag in the Classroom Education Program; $35 additional fee; design by Oklahoma Department of Agriculture in consultation with Oklahoma Arts Council)

o) *§ 1135.5(B)(16)*: **Oklahoma Statehood Centennial** (for any person wishing to commemorate centennial of Oklahoma's admission to statehood in 1907; $35 additional fee; design by Oklahoma Capitol and Centennial Commemoration Commission)

p) *§ 1135.5(B)(17)*: **Support Education** (for any person wishing to demonstrate support for education in Oklahoma; $35 additional fee; design by Oklahoma Department of Education in consultation with Oklahoma Arts Council)

q) *§ 1135.5(B)(20)*: **Urban Forestry & Beautification** (for any person wishing to demonstrate support for programs to encourage urban forestry and beautification; $35 additional fee; design by Oklahoma Department of Agriculture in consultation with certain nonprofit organizations)

r) *§ 1135.5(B)(22)*: **Adoption Creates Families** (for any person wishing to demonstrate support for pregnant women who are committed to placing their children for adoption and wishing to

provide assistance to guardians, adoptive parents and other creative families to assist in the adoption and placement of children in permanent, safe homes; $35 additional fee; design by Oklahoma Department of Human Services in consultation with Oklahoma Adoption Coalition)

s) *§ 1135.5(B)(23)*: **Choose Life** (for any person wishing to demonstrate support for organizations that encourage adoption as a positive choice for women with unplanned pregnancies; $35 additional fee; design by Choose Life, Inc.)

t) *§ 1135.5(B)(26)*: **Color Oklahoma** (for any person wishing to demonstrate support for preserving and planting wildflowers and native plants in Oklahoma and to promote Oklahoma's wildflower heritage through education; $35 additional fee)

u) *§ 1135.5(B)(28)*: **Oklahoma City Memorial Marathon** (for any person wishing to demonstrate support for the Oklahoma City Memorial Marathon; $35 additional fee; design by Oklahoma City Memorial Marathon)

v) *§ 1135.5(B)(29)*: **Oklahoma Scenic Rivers** (for any person wishing to demonstrate support for the Oklahoma Scenic Rivers; $35 additional fee)

w) *§ 1135.5(B)(30)*: **Fight Cancer** (for any person wishing to demonstrate support for the Oklahoma Central Cancer Registry; $35 additional fee)

x) *§ 1135.5(B)(31)*: **Animal Friendly** (for any person wishing to demonstrate support for controlling the overpopulation of dogs and cats

through educational and sterilization efforts; $35 additional fee; design by Veterinary Medical Association)

70. *Second Category Of Self-Expression – Support For An Institution, Entity Or Occupation*: These special license plates allow any Oklahoma motorist to express support for an institution, entity or occupation. A listing of the names of each such plate follows below, together with the associated additional fee and the identity of the designer (where specified):

a) *§ 1135.3(B)(2)*: **National Association for the Advancement of Colored People** (for any person wishing to demonstrate support for NAACP; $15 additional fee; design by NAACP)

b) *§ 1135.*[sic]*(B)(3)*: **National Rifle Association** (for any person wishing to demonstrate support for NRA; $15 additional fee; design by NRA)

c) *§ 1135.3(B)(13)*: **Civil Emergency Management** (for any person wishing to demonstrate support for state civil emergency management system; $15 additional fee; design by Civil Emergency Management)

d) *§ 1135.3(B)(14)*: **Civilian Conservation Corps** (for any person wishing to demonstrate support for the Civilian Conservation Corps; $15 additional fee; design by Civilian Conservation Corps Association)

e) *§ 1135.3(B)(17)*: **Humane Society** (for any person wishing to demonstrate support for Humane Society of the United States; $15 additional fee)

f) *§ 1135.3(B)(21)*: **Northern Cherokee Nation of the Old Louisiana Territory** (for any person wishing to demonstrate support or affinity with the Northern Cherokee Nation of the Old Louisiana Territory; $15 additional fee)

g) *§ 1135.3(B)(24)*: **Fellowship of Christian Athletes** (for members and supporters of the Fellowship of Christian Athletes; $15 additional fee; design by Fellowship of Christian Athletes)

h) *§ 1135.3(B)(25)*: **Parrothead Club** (for members and supporters of the Parrothead Club; $15 additional fee; design by Parrothead Club)

i) *§ 1135.3(B)(28)*: **Alpha Kappa Alpha** (for any person wishing to demonstrate support for Alpha Kappa Alpha Sorority; $15 additional fee; design by Oklahoma Chapter of Alpha Kappa Alpha Sorority)

j) *§ 1135.3(B)(29)*: **Kappa Alpha Psi** (for any person wishing to demonstrate support for Kappa Alpha Psi Fraternity; $15 additional fee; design by Oklahoma Chapter of Kappa Alpha Psi Fraternity Incorporated)

k) *§ 1135.3(B)(30)*: **National Pan-Hellenic Council Incorporated** (for any person wishing to demonstrate support for any of the sororities/fraternities recognized by the National Pan-Hellenic Council Incorporated; $15 additional fee; design by Oklahoma Chapter of the National Pan-Hellenic Council incorporated)

l) *§ 1135.5(B)(1)*: **University or College Supporter** (for any person wishing to demonstrate

support for any state-supported or private university or college; $35 additional fee)

m) *§ 1135.5(B)(6)*: **United States Olympic Committee Supporter** (for any person wishing to demonstrate support for USOC; $35 additional fee)

n) *§ 1135.5(B)(13)*: **Oklahoma Safe Kids Association** (for any person wishing to demonstrate support and awareness of Oklahoma Safe Kids Association; $35 additional fee; design by Oklahoma Safe Kids Association)

o) *§ 1135.5(B)(14)*: **Four-H Club** (for any person wishing to demonstrate support for Four-H Club; design by Four-H Club; $35 additional fee)

p) *§ 1135.5(B)(19)*: **Boy Scouts of America Supporter** (for any person wishing to demonstrate support for Boy Scouts of America; $35 additional fee)

q) *§ 1135.5(B)(21)*: **Oklahoma State Parks Supporter** (for any person wishing to demonstrate support for Oklahoma State Parks system; $35 additional fee; design by Oklahoma Tourism and Recreation Department)

r) *§ 1135.5(B)(24)*: **Future Farmers of America** (for any person wishing to demonstrate support for Oklahoma FFA; $35 additional fee; design by Oklahoma Future Farmers of America)

s) *§ 1135.5(B)(25)*: **Lions Club** (for any person wishing to demonstrate support for Lions Club of Oklahoma; $35 additional fee; design by Oklahoma Lions Service Foundation)

t) *§ 1135.5(B)(27)*: **Girl Scouts of America Supporter** (for any person wishing to demonstrate support for the Girl Scouts of America; $35 additional fee)

u) *§ 1135.6*: **National Association for the Stock Car Auto Racing Driver Theme** (for any person wishing to demonstrate interest in NASCAR auto racing; $40 additional fee)

71. *Third Category Of Self-Expression – Membership*: These special license plates allow any Oklahoma motorist to express his or her membership in a particular group. A listing of the names of each such plate follows below, together with the requisite eligibility criteria to purchase the plate, the associated additional fee and the identity of the designer (where specified):

a) *§ 1135.2(B)(1)*: **Prisoner of War** (for former prisoners of war or their surviving spouses; $8 additional fee)

b) *§ 1135.2(B)(2)*: **National Guard** (for active or retired members of Oklahoma National Guard; $8 additional fee)

c) *§ 1135.2(B)(3)*: **Air National Guard** (for active or retired members of Oklahoma Air National Guard; $8 additional fee)

d) *§ 1135.2(B)(4)*: **United States Armed Forces** (for active, retired, former or reserve members of U.S. Armed Forces; $8 additional fee)

e) *§ 1135.2(B)(5)*: **Congressional Medal of Honor Recipient** (for any Oklahoma resident

awarded Congressional Medal of Honor; $8 additional fee)

f) *§ 1135.2(B)(6)*: **Missing in Action** (for spouses or parents of members of U.S. Armed Forces missing in action; $8 additional fee)

g) *§ 1135.2(3)(7)*: **Purple Heart Recipient** (for any Oklahoma resident awarded Purple Heart military decoration, or spouse of such recipient; $8 additional fee)

h) *§ 1135.2(1)(8)*: **Pearl Harbor Survivor** (for any Oklahoma resident who was member of U.S. Armed Forces on Dec. 7, 1941, stationed on island of Oahu during attack, and received honorable discharge; $8 additional fee)

i) *§ 1135.2(B)(9)*: **Iwo Jima** (for any Oklahoma resident who was member of U.S. Armed Forces in February of 1945 and stationed on or in immediate vicinity of Iwo Jima; $8 additional fee design prescribed by statute)

j) *§ 1135.2(B)(10)*: **D-Day Survivor** (for any Oklahoma resident who was member of U.S. Armed Forces on June 6, 1944 and participated in Allied invasion; $8 additional fee)

k) *§ 1135.2(B)(11)*: **Killed in Action** (for spouses of members of U.S. Armed Forces killed in action; $8 additional fee)

l) *§ 1135.2(B)(12)*: **Gold Star Parents** (for parents of members of U.S. Armed Forces killed during war; $8 additional fee)

m) *§ 1135.2(B)(13)*: **Military Decoration** (for any Oklahoma resident awarded Distinguished

Service Award, Distinguished Flying Cross, Bronze Star or Silver Star military decoration; $8 additional fee)

n) *§ 1135.2(B)(14)*: **Vietnam Veterans** (for honorably discharged or present members of U.S. Armed Forces who served in Vietnam Conflict; $8 additional fee)

o) *§ 1135.2(B)(15)*: **Police Officer** (for any currently employed or retired municipal police officer; designed in consultation with state municipal police departments; $8 additional fee)

p) *§ 1135.2(B)(16)*: **World War II Veteran** (for honorably discharged former members of U.S. Armed Forces who served on federal active duty anytime from Sept. 16, 1940 to Dec. 7, 1945; $8 additional fee; design prescribed by statute)

q) *§ 1135.2(B)(17)*: **Korean War Veteran** (for honorably discharged former members of U.S. Armed Forces who served on federal active duty anytime from September 1, 1950 to April 27, 1954; $8 additional fee; design prescribed by statute)

r) *§ 1135.2(B)(18)*: **Municipal Official** (for persons elected to municipal office; design prescribed by statute; $8 additional fee)

s) *§ 1135.2(B)(19)*: **Red Cross Volunteer** (for any resident American Red Cross volunteers and staff; $8 additional fee; design prescribed by statute with assistance of Red Cross)

t) *§ 1135.2(B)(20)*: **Veterans of Foreign Wars** (for any resident member of any Veterans of

Foreign Wars organization; $8 additional fee; design by Veterans of Foreign Wars)

u) *§ 1135.2(B)(21)*: **Desert Storm** (for any honorably discharged or present member of U.S. Armed Forces who served in Persian Gulf Crisis and Desert Storm operation; $8 additional fee)

v) *§ 1135.2(B)(22)*: **Military Reserve Unit** (for any honorably discharged or present member of any U.S. Armed Forces reserve unit; $8 additional fee)

w) *§ 1135.2(B)(23)*: **Oklahoma City Bombing Victims and Survivors** (for any victim or survivor of Oklahoma City bombing attack on April 19, 1995; $8 additional fee)

x) *§ 1135.2(B)(24)*: **Civil Air Patrol** (for any member of Civil Air Patrol; design by Civil Air Patrol; $8 additional fee)

y) *§ 1135.2(B)(25)*: **Ninety-Nines** (for members of Ninety-Nines; $8 additional fee; design by Ninety-Nines)

z) *§ 1135.2(B)(26)*: **Combat Infantryman Badge** (for recipients of Combat Infantryman Badge; $8 additional fee; design prescribed by statute)

aa) *§ 1135.2(B)(27)*: **Somalia Combat Veterans** (for any honorably discharged or present member of U.S. Armed Forces who saw combat in United Nations relief effort; $8 additional fee)

bb) *§ 1135.2(B)(28)*: **Police Chaplain** (for members of International Conference of Police Chaplains; $8 additional fee; design by International Conference of Police Chaplains)

cc) *§ 1135.2(B)(29)*: **Joint Service Commendation Medal** (for any resident awarded Joint Service Commendation Medal; $8 additional fee)

dd) *§ 1135.2(B)(30)*: **Merchant Marine** (for any person who during combat was a member of the Merchant Marines; $8 additional fee; design by Oklahoma Department of Veterans Affairs)

ee) *§ 1135.2(B)(31)*: **Legislative** (for persons elected to Oklahoma legislature; $8 additional fee)

ff) *§ 1135.2(B)(32)*: **Disabled Veterans** (for disabled veterans or their surviving spouses; $8 additional fee)

gg) *§ 1135.2(B)(33)*: **United States Air Force Association** (for members of U.S. Air Force Association; $8 additional fee)

hh) *§ 1135.2(B)(34)*: **Oklahoma Military Academy Alumni** (for any resident alumnus of Oklahoma Military Academy; $8 additional fee; design by Oklahoma Military Academy)

ii) *§ 1135.2(B)(35)*: **Amateur Radio Operator** (for any person holding certain valid FCC-issued licenses; $8 additional fee)

jj) *§ 1135.2(B)(36)*: **Former Legislator** (for any person previously elected to the Oklahoma Legislature but no longer serving in that capacity; $8 additional fee)

kk) *§ 1135.2(B)(37)*: **American Legion** (for any person who is a member of the American Legion; $8 additional fee; design by American Legion)

ll) *§ 1135.2(B)(38)*: **Deputy Sheriff** (for any current or retired Oklahoma county or deputy sheriff; $8 additional fee; design by Oklahoma County Sheriff Offices)

mm) *§ 1135.3(B)(4)*: **Masonic Fraternity** (for any resident member of any Masonic Fraternity of Oklahoma; $15 additional fee; design by Masonic Fraternities of Oklahoma)

nn) *§ 1135.3(B)(5)*: **Shriner's Hospitals for Burned and Crippled Children** (for any resident member of any Shriner's Temple in Oklahoma to demonstrate support for Shriner's Hospitals for Burned and Crippled Children; $15 additional fee; design by Shriner's Temples in Oklahoma)

oo) *§ 1135.3(B)(7)*: **Order of the Eastern Star** (for any resident member of any Order of the Eastern Star; $15 additional fee; design by Order of the Eastern Star)

pp) *§ 1135.3(B)(8)*: **Knights of Columbus** (for any resident member of Knights of Columbus; $15 additional fee; design by Knights of Columbus)

qq) *§ 1135.3(B)(9)*: **Jaycees** (for members of Jaycees; $15 additional fee; design by Jaycees)

rr) *§ 1135.3(B)(10)*: **Ducks Unlimited** (for members of Ducks Unlimited; $15 additional fee; design by Ducks Unlimited)

ss) *§ 1135.3(B)(11)*: **Kiwanis International** (for members of Kiwanis International; $15 additional fee; design by Kiwanis International)

tt) *§ 1135.3(B)(12)*: **Certified Public Accountants** (for resident Certified Public Accountants;

$15 additional fee; design by Oklahoma Society of CPAs)

uu) *§ 1135.3(B)(15)*: **Rotarian License Plate** (for any resident member of Rotarian Club of Oklahoma; $15 additional fee; design by Rotarian District Governors)

vv) *§ 1135.3(B)(16)*: **Benevolent Protective Order of Elks** (for any resident member of Benevolent Protective Order of Elks; $15 additional fee; design by Benevolent Protective Order of Elks)

ww) *§ 1135.3(B)(18)*: **Oklahoma Mustang Club** (for any resident member of Oklahoma Mustang Club; $15 additional fee; design by Oklahoma Mustang Club)

xx) *§ 1135.3(B)(19)*: **American Business Clubs** (for members of American Business Clubs; $15 additional fee; design by American Business Clubs)

yy) *§ 1135.3(B)(26)*: **Oklahoma Bicycling Coalition** (for any person who is a member of the Oklahoma Bicycling Coalition; $15 additional fee; design by Oklahoma Bicycling Coalition)

zz) *§ 1135.5(B)(3)*: **Firefighter** (for any career or retired, volunteer or paid, firefighter of their surviving spouses; $15 additional fee; design prescribed by statute)

aaa) *§ 1135.5(B)(10)*: **Emergency Medical Technician** (for any emergency medical technician; $15 additional fee design by Oklahoma Association of Emergency Medical Technicians)

bbb) *1135.5(B)(18)*: **Retired Oklahoma Highway Patrol Officers** (for any retired officer of Oklahoma Highway Patrol, or their surviving spouses; $15 additional fee; design prescribed by statute)

72. *Fourth Category Of Self-Expression – Vehicle Usage*: These special license plates are available only to certain Oklahoma motorists and express how the vehicle is used. A listing of the names of each such plate follows below, together with the usage restriction, the associated additional fee and the identity of the designer (where specified):

a) *§ 1135.1(B)(1)*: **Political Subdivision** (for any vehicle owned by any Oklahoma political subdivision; $8 additional fee)

b) *§ 1135.1(B)(2)*: **Tax-Exempt or Nonprofit** (for any vehicle owned and used by tax-exempt or nonprofit organizations that provide youth programs, transport handicapped and elderly people, provide religious services, warehouse and distribute surplus foods, or provide mobile health screening services; and any vehicle primarily funded by a civil or fraternal organization with at least 100 local chapters or clubs; $8 additional fee)

c) *§ 1135.1(B)(4)* **Indian Tribal** (for any vehicle used by any Native American Indian Tribal Associations exclusively for furtherance of tribal functions; $8 additional fee)

d) *§ 1135.1(B)(6)*: **Antique or Classic** (for any vehicle 25 years or older which travels on Oklahoma highways primarily incidental to historical or exhibition purposes; $8 additional fee)

e) *§ 1135.1(B)(7)*: **Honorary Consul** (for persons who are honorary consuls authorized by the United States to perform consular duties; $8 additional fee)

73. In addition, the Statutory Scheme authorizes the OTC to issue – at no additional fee – "Physically Disabled" and "Hearing Impaired" license plates for use by eligible Oklahoma motorists in lieu of Official Plates. The process by which these two plates are issued is not challenged in this lawsuit because, among other reasons, the plates appear to be designed to serve legitimate, safety, traffic and law enforcement functions and/or do not appear to display protected speech.[2] *See* §§ 1135.1(B)(3) & 1135.1(B)(5).

As noted in ¶ 44 above, Oklahoma motorists may create their own Vehicle ID Numbers by purchasing from the OTC personally-selected configurations of letters and/or numbers consisting of seven digits or

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[2] Similarly, other provisions of the Oklahoma Code allowing for the issuance of license plates differing in appearance in any respect from Official Plates (*e.g.*, 47 Okla. St. §§ 1113(B)(4)-(6) (Oklahoma state vehicles, Highway Patrol vehicles, military vehicles); 70 Okla. St. § 1210.34 (a) (driver education training vehicles)) also are not challenged in this lawsuit because they appear to be designed to serve legitimate safety, traffic and law enforcement functions and/or do not appear to display protected speech.

less. *See* § 1135.4. Official Plates with personally selected configurations are often referred to as "personalized" or "vanity" license plates. This lawsuit does not challenge the process by which personalized or vanity plates are issued because motorists' personally-selected configurations – while typically self-expressive – do not require prior approval from the Oklahoma Legislature.

D. Currently Authorized Self-Expression On The Reproductive Rights Debate

75. The Statutory Scheme currently authorizes two different special license plates expressing views about reproductive rights. Neither one expresses support for choice in family planning.

Adoption Creates Families Plates

76. House Bill 1670 ("HB 1670") was introduced by former Oklahoma Representative Russ Roach (D) on February 5, 2001 and approved by the Oklahoma Governor on May 24, 2001. HB 1670 amended former 47 Okla. St. § 1136 to authorize the OTC's issuance of a special license plate referred to as the Respect Life – Support Adoption License Plate.

77. The Statutory Scheme was previously codified in part by former § 1136. Section 1136 was repealed and replaced by §§ 1135.1-1135.6 when House Bill 1994 ("HB 1994") was signed by the Oklahoma Governor on June 9, 2004 and became effective on July 1, 2004. HB 1994 re-named the

Respect Life – Support Adoption License Plate as the Adoption Creates Families License Plate ("Adoption Creates Families Plate"). Upon information and belief, no explanation was provided for this name change.

78. Adoption Creates Families Plate is available, upon payment of an additional $35 fee to the OTC, to any Oklahoma motorist "wishing to demonstrate support of pregnant women who are committed to placing their children for adoption and wishing to provide assistance to guardians, adoptive parents and other created families to assist in the adoption and placement of children in permanent, safe homes." § 1135.5(B)(22).

79. Section 1135.5(B)(22) provides that the Adoption Creates Families Plate would be designed in consultation with both the Oklahoma Adoption Coalition, a private non-profit organization, and the DHS.

80. Upon information and belief, the Adoption Creates Families Plate consists of a solid light yellow background. The top of the plate reads "Adoption Creates Families" in colored lettering, and the bottom reads "Oklahoma" in colored lettering. The center of the Adoption Creates Families Plate displays a realistic-looking image of a family holding hands. The first three digits of the Vehicle ID Number are displayed to the left of the image, and the last three digits are positioned to the right of the image.

81. Upon information and belief, the phrase "Adoption Creates Families" can be understood in the

context of the reproductive rights debate to express support for adoption at the exclusion of all other options available to women with unplanned pregnancies.

82. The phrase "Adoption Creates Families" and the realistic-looking image of a family holding hands displayed on the Adoption Creates Families Plate are the private speech of all Oklahoma motorists who purchase that special license plate.

Choose Life Plates

83. Upon information and belief, representatives from Choose Life, Inc. ("CLI") and/or representatives from CLI's Oklahoma affiliate ("OK-CLI") met with Oklahoma Representative Thad Balkman (R) in early March 2002. CLI is a private non-profit organization that wished to make available to Oklahoma motorists a special license plate displaying the phrase "Choose Life."

84. One purpose for the meeting between CLI, OK-CLI and Representative Balkman was to draft a bill that would amend former § 1136 (*i.e.*, before it was repealed and replaced by §§ 1135.1-135.6 [sic], *see* ¶ 77 above) to authorize a special license plate displaying the phrase "Choose Life."

85. CLI and OK-CLI believe that the phrase "Choose Life" is "a simple statement with an important message." <http://www.choose-life.org/aboutus.html>. Specifically, upon information and belief, CLI

and OK-CLI understand the phrase "Choose Life" to express support for adoption at the exclusion of all other reproductive options available to women with unplanned pregnancies.

86. Upon information and belief, Representative Balkman persuaded Senator Jim Williamson (R) in early April 2002 to revise House Bill 2278 ("HB 2278"). Prior to its revision, HB 2278 proposed an amendment to former § 1136 clarifying that the "Oklahoma Mustang Club License Plate" would be available for sale only to Mustang Club members.

87. The revisions to HB 2278 proposed by Representative Balkman included a second amendment to former § 1136 that would authorize the OTC's issuance of a special license plate known as the Choose Life License Plate ("Choose Life Plate").

88. Revised HB 2278 was approved by the Oklahoma Senate on April 24, 2002, approved by the Oklahoma House of Representatives on April 30, 2002, and approved by the Oklahoma Governor on May 6, 2002. It became effective on November 1, 2002.

89. Following the repeal of § 1136, the Choose Life Plate was codified at § 1135.5(B)(23) (*see* ¶ 77 above).

90. The Choose Life Plate is available, upon payment of an additional $35 fee to the OTC, to any Oklahoma motorist "who wishes to demonstrate support of organizations that encourage adoption as a

positive choice for women with unplanned pregnancies." § 1135.5(B)(23).

91. Section 1135.5(B)(23) provides that the Choose Life Plate would be designed by CLI.

92. The Choose Life Plate consists of a solid yellow background. The top of the plate reads "Choose Life" in red lettering, and the bottom reads "Oklahoma" in red lettering. The left side of the Choose Life Plate displays a hand-sketched illustration of two young children's smiling faces. The right side displays in blue lettering the Vehicle ID Number.

93. Photographs of the Choose Life Plate are available online at various internet websites. *See, e.g.*, <http://www.okchoose-life.org>; <http://www.plateshack.com/y2k/Oklahoma/ok2003chooselife.jpg>. An image from one such website of the Choose Life Plate is attached as Exhibit C.

94. Upon information and belief, the design selected by CLI for the Choose Life Plate is the same design that CLI and its local affiliates use for the merchandise that they market using slogans such as "Tell other drivers 'I'M FOR IT'" and "Take a Stand for Life." *See* <http://www.ecognizant.net/chooselife/show_items.tcl> (indicating that online "Choose Life Store" publicly markets and sells neckties, scarves, caps, clothing for adults, children and babies, teddy bears, tote bags, jewelry, key chains, decals, license plate frames, and replica or mock license plates). It is also the same design used by CLI and its local affiliates for the purpose of allowing motorists in other

states to express this particular view about reproductive rights.

95. Upon information and belief, OK-CLI and/or CLI independently and at their own expense promote the Choose Life Plate to Oklahoma motorists. For example, OK-CLI and/or CLI are providing churches with mail-order, applications for private distribution. Also upon information and belief, OK-CLI and/or CLI are also in the process of providing approximately 300 tag agencies located throughout the State of Oklahoma with color advertisements for the Choose Life Plate.

96. The phrase "Choose Life" and the hand-sketched illustration of two young children's smiling faces displayed on the Choose Life Plate are the private speech of all Oklahoma motorists who purchase that special license plate.

E. Choose Life Funding Restrictions

97. Section 1135.5(B)(23) prescribes apportionment by the OTC of the $35 additional fee paid by those Oklahoma motorists who purchase a Choose Life Plate. Of this amount, $20 is to be deposited into the Choose Life Assistance Program Revolving Fund (the "Choose Life Fund") for further apportionment pursuant to 47 Okla. St. § 1104.6, $8 is to be deposited into the OTC Reimbursement Fund (*see* ¶ 65

above) and $7 is to be apportioned pursuant to § 1104 (*see* ¶ 66 above).[3]

98. Section 1104.6(B) further requires that all monies deposited into the Choose Life Fund be distributed at the beginning of each fiscal year in a pro rata share to all eligible organizations.

99. The Choose Life Fund was created and is maintained by the Treasurer. *See* § 1104.6(B). The OTC deposits $20 of the additional fee paid by Oklahoma motorists who purchase the Choose Life Plate into the Choose Life Fund. *See* § 1104.6(A). The DHS withdraws monies from the Choose Life Fund to administer and implement §§ 1104.6(C)-(F). A copy of 47 Okla. St. § 1104.6 is attached as Exhibit B (*see* 2004 OK. ALS 504, § 6 at pp. 4-5).

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[3] The additional fee paid by those Oklahoma motorists who purchase an Adoption Creates Families Plate is required by statute to "be deposited in a revolving fund established in the State Treasury for and to be used by the [DHS] for the implementation of the Investing in Stronger Oklahoma Families Act specifically for created families." 47 Okla. St. § 1135.5(B)(22). That Act is intended "to provide assistance to guardians of children, adoptive parents and other 'created families,' to assist such guardians, adoptive parents and families to assume permanent custody of children in need of safe and permanent homes, and to enhance family preservation and the stability of these homes." 10 Okla. St. § 22.2(B). Any funding restrictions associated with the Respect Life Plate are not challenged in this lawsuit because ORC does not currently seek to provide such services.

100. Section 1104.6 provides that certain nonprofit organizations may apply to the DHS for disbursement of monies from the Choose Life Fund. Eligible organizations are defined by statute as nonprofit organizations that, among other criteria: (*a*) "counsel[] pregnant women who are committed to placing their children for adoption;" (*b*) do not charge women for services rendered; and (*c*) agree to use 60% of the monies they receive from the Choose Life Fund to provide for the material needs of pregnant women committed to placing their children for adoption and/or infants awaiting adoption placement, and 40% for adoption counseling, training, or advertising. § 1104.6(C).

101. Section 1104.6 prohibits disbursement of monies from the Choose Life Fund to organizations that are "involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising." § 1104.6(C)(4); *see id.* § 1104.6(D).

102. Recipients of disbursements from the Choose Life Fund must submit to an annual audit verifying that such monies were used in the manner prescribed by §§ 1104.6(C)-(E). *See* § 1104.6(F).

103. Upon information and belief, the Choose Life Fund currently has monies available for disbursement to eligible organizations.

VI. ADDITIONAL ALLEGATIONS

A. Motorist Plaintiffs' Desired Self-Expression

104. Each Motorist Plaintiff is a resident of Tulsa, Oklahoma who owns a validly-registered motor vehicle for which he or she would like to purchase a special license plate expressing support for choice in family planning.

105. None of the Motorist Plaintiffs has been successful in his or her efforts to do so.

106. Each Motorist Plaintiff went to his or her local tag agency and specifically asked to purchase a special license plate expressing support for choice in family planning.

107. Motorist Plaintiffs were notified by their local tag agencies that no such special license plate is available for purchase by Oklahoma motorists. Instead, the Motorist Plaintiffs were advised to contact the OTC Motor Vehicles Division for further information regarding the availability of a special license plate expressing support for choice in family planning.

108. Motorist Plaintiff Moskowitz subsequently contacted the OTC Motor Vehicles Division to request a special license plate expressing support for choice in family planning, but was advised that no such special license plate currently exists.

109. When Motorist Plaintiff Moskowitz inquired why she and other Oklahoma motorists are

not able to purchase a special license plate displaying this particular view about reproductive rights, she was informed that such plates can be made available only by statutory amendment.

110. Based on her conversation with a representative from the OTC Motor Vehicles Division, Motorist Plaintiff Moskowitz understands that a special license plate expressing support for choice in family planning will be made available for purchase by Oklahoma motorists *only if*: (*a*) a member of the Oklahoma Legislature agrees to sponsor a bill that would amend 47 Okla. St. §§ 1135.1-1135.6 to authorize the OTC's issuance of such a plate; *and* (*b*) the bill is approved by the appropriate Legislative committee(s); *and* (*c*) the bill is approved by the Legislature; *and* (*d*) the bill is successfully enacted into law by signature of the Governor (or by passage of the five-day waiting period).

111. Over two years ago, the Oklahoma Reproductive Health Coalition sought passage of an amendment to §§ 1135.1-1135.6 that would authorize the OTC's issuance of a special license plate expressing support for choice in family planning. Motorist Plaintiff Santee and ORC were members of the Oklahoma Reproductive Health Coalition and involved with that effort.

112. On February 3, 2003, Senator Angela Monson (D) introduced Senate Bill 548 ("SB 548"), which would have amended former § 1136 (before it was repealed and replaced by §§ 1135.1-1135.6, *see*

¶ 77 above) to authorize a new "Choice in Family Planning License Plate" (the "Family Planning Plate") effective as of November 1, 2003.

113. Specifically, SB 548 would have authorized the OTC to issue a Family Planning Plate to any person wishing to demonstrate support of choice in family planning. The Family Planning Plate would be available for purchase by Oklahoma motorists subject to an additional fee of $25, of which $20 would be deposited into a newly-created "Choice in Family Planning Revolving Fund" (the "Family Planning Fund"), and of which $5 would be deposited into the OTC Reimbursement Fund (*see* ¶ 65 above).

114. SB 548 would have further provided for an amendment to 47 Okla. St. § 1104 that would authorize the Treasurer to create the Family Planning Fund, which would then be used by the DHS to fund family planning functions and activities.

115. SB 548 was referred to the Senate Finance Committee on February 4, 2003 and remained dormant there for over a year. Upon information and belief, a bill dies if not passed during the [sic] either the first, or the second regular session after its introduction. The Oklahoma Legislature adjourned its most recent second regular session *sine die* on May 28, 2004 without acting on SB 548. Accordingly, SB 548 officially died on May 28, 2004. *See* <http://www.lsb.state.ok.us/>.

116. Upon information and belief, no action was taken on SB 548 because the Oklahoma Legislature

disagreed with the expression to be displayed on the proposed Family Planning Plate and/or did not want a Family Planning Plate available for purchase by Oklahoma motorists.

117. There is no compelling or any other governmental interest satisfied by, on the one hand, allowing the OTC to make Choose Life Plates available for purchase by Oklahoma motorists who wish [sic] express support for adoption as a preferred family planning option, and on the other hand, failing to allow the OTC to make Family Planning Plates available for purchase by Oklahoma motorists who wish to express support for choice in family planning.

118. Also on February 3, 2003 – the same day that SB 548 was introduced – Representative Clay Pope (D) introduced House Bill 1599 ("HB 1599"), which would amend what is currently § 1135.5(B) to authorize the OTC to create and issue a new Lions Club License Plate ("Lions Club Plate") to any person wishing to demonstrate support for the Lions Club of Oklahoma. The Lions Club Plate would be designed by the Lions Club and subject to an additional $15 fee.

119. In contrast to SB 548, HB 1599 was unanimously approved by the House of Representatives on March 5, 2003, unanimously approved by the Senate on April 9, 2003, and approved by the Oklahoma Governor on April 15, 2003. It became effective on November 1, 2003. *See* ¶ 70(s) above.

120. Upon information and belief, HB 1599 was promptly enacted because the Oklahoma Legislature agreed with the expression displayed on the Lions Club Plate and/or wanted a Lions Club Plate available for purchase by Oklahoma motorists.

121. There is no compelling or any other governmental interest satisfied by, on the one hand, allowing the OTC to make Lions Club Plates available for purchase by Oklahoma motorists who wish to express support for the Lions Club, and on the other hand, failing to allow the OTC to make Family Planning Plates available for purchase by Oklahoma motorists who wish to express support for choice in family planning.

122. HB 1994, which was pre-filed on January 16, 2004 by Representative Bill Mitchell (D) and enacted six months later, authorized the OTC to issue 22 new special license plates: Electric Lineman; Organ, Eye and Tissue; Color Oklahoma; Oklahoma City Memorial Marathon; Oklahoma Scenic Rivers; Fight Cancer; Animal Friendly; Northern Cherokee Nation of the Old Louisiana Territory; Fellowship of Christian Athletes; Parrothead Club; Alpha Kappa Alpha; Kappa Alpha Psi; National Pan-Hellenic Council; Girl Scouts of America Supporter; NASCAR; Amateur Radio Operator; Former Legislator; American Legion; Deputy Sheriff; Oklahoma Bicycling Coalition; Antique or Classic; and Honorary Counsul [sic].

123. Upon information and belief, HB 1994 was promptly enacted because the Oklahoma Legislature

agreed with the expression displayed on such plates and/or wanted such plates available for purchase by Oklahoma motorists.

124. There is no compelling or any other governmental interest satisfied by, on the one hand, allowing the OTC to make the special license plates identified in paragraph 122 above available for purchase by Oklahoma motorists who wish to support such causes, ideas, hobbies, institutions, entities or occupations, and on the other hand, failing to allow the OTC to make Family Planning Plates available for purchase by Oklahoma motorists who wish to express support for choice in family planning.

B. Statutory Scheme Lacks Viewpoint Neutrality

125. Through the Statutory Scheme, the Oklahoma Legislature and the Governor have created at least a nonpublic forum for private speech on special license plates. The Statutory Scheme simultaneously generates revenue for the State of Oklahoma while allowing Oklahoma motorists access to this State-created forum.

126. Upon information and belief, Oklahoma motorists paid to the OTC at least $605,000 in special license plate fees for the purchase of approximately 33,000 special license plates during the period between August 1, 2002 and July 31, 2003. Upon information and belief, updated figures for special license

plates purchased through July 31, 2004 will be available in mid-September.

127. The Statutory Scheme constitutes a prior restraint on Oklahoma motorists' exercise of their First Amendment rights. Motorists must first obtain approval from the Oklahoma Legislature and the Governor if their desired self-expression is not among those already "approved" for display in the forum. Motorists who are unsuccessful in their efforts to obtain legislative and gubernatorial "approval" and who, as a result, attempt to express themselves in the forum by altering their Official Plates are subject to misdemeanor prosecution and punishment by fine.

128. The Statutory Scheme imposes unreasonable restrictions on Oklahoma motorists' exercise of their First Amendment rights. Such restrictions have a chilling effect on the display of protected speech in the forum and do not advance any compelling or other governmental interest.

129. The Statutory Scheme allows the Oklahoma Legislature to limit access to this State-created forum only to those Oklahoma motorists of whose speech the legislators and Governor approve. Specifically, the Statutory Scheme grants the Oklahoma Legislature and Governor unbridled discretion in determining whether to amend §§ 1135.1-1135.6 to allow the OTC to issue special license plates displaying previously "unapproved" self-expression.

There are no standards governing these determinations.[4]

130. Although the Oklahoma Administrative Code provides that "[n]o special license plate will be issued which may be offensive to the general public" (Okl. Admin. Code § 710:60-3-150(d)), the Motorist Plaintiffs do not believe this provision applies to the Oklahoma Legislature's ability to amend §§ 1135.1-1135.6 to authorize the issuance of new special license plates. However, to the extent Defendants may argue or the Court may find that the Oklahoma Legislature is bound by this provision, Motorist Plaintiffs challenge § 710:60-3-150(d) on the ground that it constitutes a grant of unbridled discretion because the lack of any clear explanation of may be "offensive to the general public" allows for *ad hoc* determinations by the Oklahoma Legislature that are not viewpoint neutral.

131. The Statutory Scheme lacks any procedural safeguards against the risk of viewpoint discrimination by the Oklahoma Legislature or Governor, in determining whether to grant Oklahoma

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[4] HB 1994 directed the OTC to enter into a joint study with the Department of Public Safety for the purpose of developing a uniform basic format for Oklahoma special license plates and authorizes the OTC to implement such format as agreed to by the Department of Public Safety. *See* Exhibit B at p. 24 (referring to uncodified Section 21). Even if implemented, a uniform basic format for the configuration of self-expression by Oklahoma motorists would continue to lack standards governing which self-expression is eligible for such configuration.

motorists access to this State-created forum. Specifically, the Statutory Scheme does not contain any time limit within which the Oklahoma Legislature must determine whether to amend §§ 1135.1-1135.6 to authorize issuance special license plates displaying previously unauthorized self-expression, and there is no provision for prompt judicial review of decisions refusing such access.

132. The risk of viewpoint discrimination is exacerbated under the Statutory Scheme because it is exceedingly unlikely that Oklahoma legislators or the Governor would support legislation authorizing the issuance of new special license plates for the display of self-expression deemed unpopular among the Oklahoma electorate.

C. Choose Life Funding Restrictions Infringe Free Speech

133. Upon information and belief, Oklahoma motorists have already purchased Choose Life Plates. As a result, monies should already have been deposited by the OTC into the Choose Life Fund maintained by the Treasurer for disbursement to eligible organizations by the DHS.

134. ORC would like to apply for and receive disbursements from the Choose Life Fund in order to (*a*) create a program that would provide direct support to pregnant women who have decided that adoption is the appropriate option given their circumstances, and

(*b*) support counseling and associated training about adoption as a family planning option.

135. However, ORC fails to satisfy the criteria for funding eligibility set forth in § 1104.6.

136. ORC is ineligible to receive disbursements from the Choose Life Fund because ORC is "involved or associated with abortion activities." §§ 1104.6(C)(4) and (D). Specifically, ORC:

- provides telephone counseling and referrals for counseling on all reproductive options available to women with unplanned pregnancies – including, parenting, adopting, foster care and abortion;
- maintains a Roe Fund to help cover the costs (including child care, travel, overnight accommodations and medical care) incurred by impoverished women who have decided that abortion is the appropriate option in their circumstances;
- participates in non-violent demonstrations outside health facilities providing abortion services;
- sponsors periodic worship, fellowship and educational gatherings for community members who support choice in family planning; and
- promotes the Clergy for Choice Network of the Religious Coalition for Reproductive Choice, which is a national registry of clergy of all faiths who believe that

> family planning encompasses a wide range of issues, including access to safe, legal and affordable adoption and abortion services.

137. ORC would not use any disbursements received from the Choose Life Fund to fund these or any other activities involved or associated with abortion.

138. Each of these activities involves the exercise by ORC of constitutionally-protected speech regarding choice in family planning.

139. Aside from its involvement and/or association with the types of activities described in ¶ 136 above, ORC otherwise satisfies all of the criteria for funding eligibility set forth in the Choose Life Statute.

140. Section 1104.6 unduly interferes with and discourages constitutionally-protected speech activities by denying a benefit to organizations that engage in such activities. Specifically, §§ 1104.6(C)(4) and (D) impermissibly render ORC ineligible to receive disbursements from the Choose Life Fund – notwithstanding that ORC would use those disbursements to fund only activities that are not involved or associated with abortion – solely because the Oklahoma Legislature disagrees with ORC's speech regarding choice in family planning.

* * *

FIRST CLAIM FOR RELIEF
(Motorist Plaintiffs – Freedom of Speech)

141. The allegations of ¶¶ 1 through 140 above are incorporated as though fully set forth herein.

142. On its face, the Statutory Scheme violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C § 1983.

143. The Statutory Scheme is presumptively unconstitutional because it both grants the Oklahoma Legislature and Governor unbridled discretion and lacks viewpoint neutral standards for determining which Oklahoma motorists will be permitted access to a State-created speech forum. With these faults, every application of the Statutory Scheme creates an impermissible risk that viewpoint discrimination will lead to suppression of protected expression.

144. The Statutory Scheme is presumptively unconstitutional because it lacks adequate procedural safeguards against decision-making delay and prompt judicial review. With these faults, every application of the Statutory Scheme creates an impermissible risk that viewpoint discrimination will lead to suppression of protected expression.

145. The restrictions imposed by the Statutory Scheme are not narrowly drawn to achieve a compelling or any other governmental interest.

SECOND CLAIM FOR RELIEF
(Motorist Plaintiffs – Freedom of Speech)

146. The allegations of ¶¶ 1 through 145 above, are incorporated as though fully set forth herein.

147. As applied to the Motorist Plaintiffs, the Statutory Scheme violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C § 1983 because the Oklahoma Legislature engaged in viewpoint discrimination when it authorized the expression of only certain views about reproductive rights in a State-created speech forum.

148. As applied to the Motorist Plaintiffs, the Statutory Scheme violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C § 1983 because the Oklahoma Legislature engaged in viewpoint discrimination by failing to allow Motorist Plaintiffs to express their view about reproductive fights in a State-created speech forum.

149. The Statutory Scheme is not narrowly drawn to achieve a compelling or any other governmental interest justifying the Oklahoma Legislature's failure to amend 47 Okla. St. §§ 1135.1-1135.6 to allow the OTC to issue Family Planning Plates.

THIRD CLAM FOR RELIEF
(Motorists Plaintiffs – Due Process)

150. The allegations of ¶¶ 1 through 149 above are incorporated as though fully set forth herein.

151. The Statutory Scheme violates the Due Process protection accorded by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 because it conditions access of Oklahoma motorists to a State-created speech forum on a statutory amendment by the Oklahoma Legislature and Governor authorizing the desired self-expression.

152. The Statutory Scheme is not narrowly drawn to achieve a compelling or any other governmental interest justifying this undue burden on Oklahoma motorists' First Amendment rights.

153. Moreover, even if this burden were sufficiently justified, the Statutory Scheme also violates Due Process because it does not adequately notify Oklahoma motorists of what, if any, additional self-expression would be permitted or prohibited in a State-created speech forum.

FOURTH CLAIM FOR RELIEF
(Motorists Plaintiffs – Equal Protection)

154. The allegations of ¶¶ 1 through 153 above are incorporated as though fully set forth herein.

155. The Statutory Scheme violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C § 1983 because it allows for, and in fact has resulted in, impermissible viewpoint discrimination among otherwise similarly-situated Oklahoma motorists in permitting access to a State-created speech forum.

156. The Statutory Scheme is not narrowly drawn to achieve a compelling or any other governmental interest justifying a distinction between allowing certain Oklahoma motorists to express themselves on special license plates and refusing to allow other Oklahoma motorists to do the same.

FIFTH CLAIM FOR RELIEF
(Organizational Plaintiff – Freedom of Speech)

157. The allegations of ¶¶ 1 through 156 above are incorporated as though fully set forth herein.

158. 47 Okla. St. § 1104.6 violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C § 1983 by impermissibly denying ORC the ability to apply for and receive money from the Choose Life Fund solely on the basis of ORC's involvement and association – through other funding sources – with abortion activities.

159. 47 Okla. St. § 1104.6 is not narrowly drawn to achieve a compelling or any other governmental interest justifying ORC's ineligibility to receive Choose Life Fund disbursements based on the expression of constitutionally-protected speech.

SIXTH CLAIM FOR RELIEF
(Organizational Plaintiff – Equal Protection)

160. The allegations of ¶¶ 1 through 159 above are incorporated as though fully set forth herein.

161. 47 Okl. St. § 1104.6 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C § 1983 because it allows for, and in fact has resulted in, impermissible discrimination among otherwise similarly-situated non-profit organizations regarding their eligibility for disbursements from the Choose Life Fund.

162. 47 Okla. St. § 1104.6 is not narrowly drawn to achieve a compelling or any other governmental interest justifying a distinction between organizations that are, eligible to receive money from the Choose Life Fund and those that are rendered ineligible based on the exercise of constitutionally-protected rights to freedom of speech.

* * *

REQUESTS FOR RELIEF

163. Plaintiffs respectfully request that the Court grant the following relief:

164. Declare that the Statutory Scheme is unconstitutional; *and* enjoin the Defendants, their agents, and their successors in office from implementing or further enforcing all provisions of 47 Okla. St. §§ 1135.1-1135.6 (with the exceptions of §§ 1135.1(B)(3), 1135.1(B)(5) & 1135.4); *or, in the alternative*,

165. Declare that allowing a special license plate expressing only certain views about reproductive rights but not a special license plate expressing a

different view is unconstitutional; *and* enjoin the Defendants, their agents, and their successors in office from implementing or further enforcing 47 Okla. St. §§ 1135.5(B)(22) & 1135.5(B)(23); *and*

166. Declare that prohibiting the distribution of government funds raised by sales of the Choose Life Plate based on constitutionally-protected speech relating to a woman's exercise of choice in family planning is unconstitutional; *and* enjoin the Defendants, their agents, and their successors in office from implementing or further enforcing subsections C(4) and D of 47 Okla. St. § 1104.6; *and* sever subsections C(4) and D from the remainder of 47 O. S. § 1104.6; *and*

167. Award Plaintiffs their costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; *and*

168. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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Dated: August 18, 2004

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No. 07-297

FILED
OCT 09 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

HAROLD E. HILL, et al.,
Petitioners,

v.

THOMAS E. KEMP,
Chairman, Oklahoma Tax Commission, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Petition for Certiorari be denied in a federal 42 U.S.C. § 1983 civil rights case dismissed under the Tax Injunction Act, where Petitioners attempt to enjoin the collection of yearly registration fees assessed by the State of Oklahoma for specialty license plates displayed on motor vehicles:

(1) Where Oklahoma registration statutes were amended during appeal allowing groups, like Petitioners, to have their own type of specialty license plate that may express a family planning message, and

(2) Where Petitioners lack standing to challenge a registration scheme without establishing injury in fact, causation and redressability, and

(3) Where venue and Article III jurisdiction are unresolved legal issues that cloud the necessity of addressing Tax Injunction Act issues as raised by Petitioners, and

(4) Where the 10th Circuit Court of Appeals properly determined that yearly registration fees are taxes for purposes of the Tax Injunction Act?

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RESTATEMENT OF JURISDICTION

The Court lacks jurisdiction under Article III of the United States Constitution and the Tax Injunction Act, 28 U.S.C. § 1341.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Petitioners sue under 42 U.S.C. § 1983 for injunctive and declaratory relief in a state tax case when an adequate legal remedy exists. Venue was alleged under 28 U.S.C. § 1391(b).

RESTATEMENT OF THE CASE

Petitioners filed a federal 42 U.S.C. § 1983 civil rights complaint in the Northern District of Oklahoma against state officers, in their official capacities, seeking an injunction to ban yearly registration of specialty license plates on vehicles registered in Oklahoma.[1] At the time, the list of different types of specialty license plates available was long, but did not include one(s) the Petitioners preferred. The requested relief was to ban all specialty license plates (except inexplicably, Personalized License Plates, Physically Disabled License Plates and Hearing Impaired License Plates). Alternatively, Petitioners asked to ban two specialty license plates: Adoption Creates Families License Plates and Choose Life License Plates. The trial court ruling on Federal Rule of Civil Procedure

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[1] All defendants reside in the Western District of Oklahoma and venue is improper.

12(b) motions to dismiss held that the desired ban was an attack on state taxes and dismissed the complaint as required by the Tax Injunction Act, 28 U.S.C. § 1341. The 10th Circuit Court of Appeals affirmed.

While the matter was on appeal (and before the decision by the 10th Circuit Court of Appeals was entered) the specialty license plate statutes in Oklahoma were amended to allow groups to pay a yearly registration fee for a specialty license plate with a message to their liking.[2] Petitioners would be able to display their group's specialty license plates concerning family planning if they complied with the new statutes. Thereafter Petitioners could continue to display family planning license plates as long as they continued to pay yearly registration.[3] The 10th Circuit noted the change in the statutes this way:

> [Petitioners] are now free to apply for and receive a specialty plate demonstrating their support for abortion rights and even providing financial support to abortion-related programs. Appendix A at p. 11a.

Petitioners on appeal are challenging this amended statutory scheme, even though they have not been

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[2] To start a new specialty tag there would initially need to be 500 prepaid applicants under the new statutes. 47 Okl. Stat. Supp. 2006, §§ 1135.7 and 1135.8.

[3] Special license plates shall be renewed each year by the Tax Commission or a motor license agent. 47 Okl. Stat. Supp. 2006, § 1135.7(F).

frustrated in any attempt to garner specialty license plates containing their message under the new law. There is nothing in the factual record before this court from which one could conclude that Petitioners are suffering a continuing harm for which injunctive relief banning specialty license plates might be appropriate.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Where Petitioners Lack Standing to Challenge Oklahoma's Specialty License Plate Registration Scheme.

The questions presented by Petitioners concern the Tax Injunction Act (TIA), 28 U.S.C. § 1341. It is respectfully suggested that consideration of TIA issues are not ripe for consideration on the record before this court, as Petitioners have not met their burden of establishing standing to invoke Article III jurisdiction.

Even where Article III standing has not been raised by the parties, this Court is "obliged to examine standing sua sponte where standing has erroneously been assumed below.[4] *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("'[I]f the record discloses that the lower court was without jurisdiction this court will

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[4] Respondents raised standing in the trial court and it has not been ruled upon. *See* Petitioners' Appendix B at p. 58a, footnote 2 where the trial court states that standing, venue and ripeness have been raised, but she did not reach those issues.

notice the defect, although the parties make no contention concerning it'") (quoting *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829, 80 L. Ed. 1263 (1936))." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).

Although this case began as primarily an attack on Oklahoma's "Adoption Creates Families License Plates" and "Choose Life License Plates" once on appeal matters changed. Initially there had been no statutory ability for Petitioners to garner specialty license plates with their desired message, absent legislative action. After the dismissal was appealed, Oklahoma amended its statutory registration scheme to allow a greater diversity in specialty car tags. As the 10th Circuit Court of Appeals noted: "[Petitioners] are now free to apply for and receive a specialty plate demonstrating their support for abortion rights and even providing financial support to abortion-related programs". *See* Petitioners' Appendix A at p.11a.

Petitioners take the counter intuitive position that the new statutes should be stricken, even though the new statutory scheme would allow them the ability to display family planning messages they desire. They assert that the new law impermissibly burdens their ability to garner specialty license plates, arguing that the new statutory procedures are "unreasonable" restrictions when compared to other specialty license plates procedures. Petitioners seek to strike down the very law that allows them to have their preferred specialty license plate.

Be that as it may, by taking this posture Petitioners have run afoul of Article III jurisdiction.

The record is devoid of factual support for their new position. Petitioners have never sought to use the new registration scheme and have never sought to have their message displayed. On this record there simply is no factual support for the assertion that the new statutes create constitutionally unreasonable restrictions with respect to these Petitioners. In other words, Petitioners make no allegations of an actual injury with respect to the registration scheme that currently exists. As a result, Petitioners allege no injury in fact and Article III jurisdiction is lacking. Petitioners have no standing to seek federal court jurisdiction.

Standing requires three elements: injury in fact to the plaintiff, causation of that injury by the defendant's complained-of conduct, and a likelihood that the requested relief will redress that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "[T]he party invoking federal jurisdiction bears the burden of establishing its existence. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 607-608, 107 L. Ed. 2d 603 (1990)." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998). "[A]n injury in fact [is] an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

Here an injury by Petitioners is absent. There is merely a conclusory assertion that the new procedures are unreasonable. Petitioners have never alleged any attempt to use the new procedures and present

themselves before this court with no allegations of an actual injury in fact.[5]

Further, Petitioners did not establish redressability for Article III standing in the complaint or now on appeal. Petitioners ask to ban all but three specialty license plates (Personalized License Plates, Physically Disabled License Plates and Hearing Impaired License Plates).[6] *See also* Petition for Writ of Certiorari at p. 1, footnote 2. Alternatively, they ask to ban two specific plates: Adoption Creates Families License Plates and

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[5] Further, Petitioners cannot create causation by their own actions. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005).

[6] The complaint states:

> 163. Plaintiffs respectfully request that the Court grant the following relief:
>
> 164. Declare that the Statutory Scheme is unconstitutional; *and* enjoin the Defendant, their agents, and their successors in Office from implementing or further enforcing all provisions of 47 Okla. St. § 1135.1-1135.6 (with the exceptions of §§ 1135.1(B)(3), 1135.1(B)(5) & 1135.4; or, in the alternative,
>
> 165. Declare that allowing a special license plate expressing a different view is unconstitutional; *and* enjoin the Defendants, their agents, and their successors in Office from implementing or further enforcing all provisions of 47 Okla. St. §§ 1135.5(B)(22) & 1135.5(B)(23).

Choose Life License Plates. On appeal the ban request now centers upon the new sections of law.

In order to meet the requirements of standing, Petitioners must show that the injury about which they complain will "likely ... be redressed by a favorable decision" of the court. *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136. In this instant matter the relief they seek would function to prevent nearly everyone, including Petitioners, from displaying any specialty license plates. A favorable decision will not provide Petitioners with relief for Petitioners' alleged injury. Without redressability of the asserted injury, Petitioners lack standing. *See Steel Co., supra. See also Henderson v. Stalder*, 287 F.3d 374 (5th Cir.2002) and, *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir.2003) (rejecting challenge to Florida "Choose Life" plate for lack of standing).

Petitioners' purported injury as stated in their complaint is the unfulfilled wish to express themselves with specialty license plates, which they acknowledge is "a unique means of promoting their views."[7] They complain that the injury is this inability to express themselves, but the relief requested does not redress the alleged injury. Petitioners simply do not seek to establish redressability.

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[7] The complaint states:

> 17. Motorist Plaintiffs wish to express themselves in this manner because they believe a special license plate is a unique means of promoting their views about reproductive rights.

Article III standing does not exist. Accordingly, the necessity of reaching resolution of purported important TIA issues is lacking. The petition should be denied.

II. The 10th Circuit Court of Appeals Properly Applied Controlling Case Law with Respect to the Tax Injunction Act.

The two cases identified by Petitioners supporting their split-in-the-circuits argument were both denied review the same day, June 26, 2006, *Henderson v. Stalder*, 407 F.3d 351 (5th Cir.2005), *cert. denied*, --- U.S. ----, 126 S. Ct. 2967, 165 L. Ed. 2d 950 (2006) and *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006). And although those cases have dissimilar reasoning with respect to identifying what is a "tax" for purposes of TIA, both cases disposed of the matters in the same manner – plaintiffs fail in their attempt to ban the specialty license plates of others. The instant case has the same result.

Here the 10th Circuit Court of Appeals was asked to determine if the registration of specialty license plates under Oklahoma's registration scheme was a tax which prevented federal court intervention because of the Tax Injunction Act.

Petitioners suggest that this Court should categorize Oklahoma's registration system as a system similar to the purchase of a souvenir at a state park. This analysis fails under the facts. It glosses over or simply omits from consideration the recurring nature of registration. Although the first year might look a bit

like the purchase of a souvenir at the state park, the analogy collapses when one looks at the following year, and the next. One does not return each year to the gift shop and pay full price yearly in order to continue to display the souvenir. The registration system in Oklahoma requires yearly registration and yearly specialty tag fees.[8] Attempts to characterize yearly registration as a simple purchase are incorrect. The registration is a tax. The decision below was correct.

Petitioners next suggest that the TIA exception carved out in *Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004), should be expanded to include the current factual circumstances. As the 10th Circuit correctly determined: "Simply put, the Court held that giving away a tax credit is a very different thing than assessing, levying or collecting a tax." The *Hibbs* exception has no applicability to a case where the protagonist wants to shut down the collection of motor vehicle registration. In effect, Petitioners want to stop the collection of recurring registration taxes. TIA prevents federal trial court interdiction.[9]

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[8] A few specialty tags do not have recurring yearly fees, but registration continues to be yearly.

[9] As the dissent notes in *Hibbs*:

> "The practical effect is that a literal reading of the TIA provides for federal district courts to stand at the ready where litigants encounter legal or practical obstacles to challenging state tax credits in

Finally, it is noted that this suit is prosecuted only as a 42 U.S.C. § 1983 suit. No other causes of action have been alleged. This Court ruled in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 589 (1995): "[W]e hold that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists." As that case demonstrates, Oklahoma can and has provided clear and adequate legal remedies. Petitioners' assertion to the contrary is specious.

The 10th Circuit Court of Appeals was correct in affirming the dismissal of Petitioners' claims.

III. Venue Is Improper in the Northern District of Oklahoma.

All State officials sued in this matter have their official residence in Oklahoma County, Oklahoma, which lies in the Western District of Oklahoma. Venue is improper in the Northern District of Oklahoma. The trial court dismissed this matter on jurisdictional grounds and has not addressed venue. *See* Petitioners' Appendix B at p. 58a, footnote 2.

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state courts. **And this Court, of course, stands at the ready to review decisions by state courts on these matters."**

Hibbs, 542 U.S. at 121.

Title 28 U.S.C § 1391(b) provides:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Public officer residence for venue purposes means the official, and not the actual, residence of the individual officer. For venue purposes, the residence of a state official is located at his official office, even if the state official maintains branch offices in other parts of the state. *See Neville v. Dearie*, 745 F. Supp. 99 (D.C.N.Y.1990). *See also Taylor v. White*, 132 F.R.D. 636 (E.D. Pa. 1990).

CONCLUSION

The petition should be denied for reasons stated above.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 27 2007
OFFICE OF THE CLERK

No. 07-297

IN THE

Supreme Court of the United States

HAROLD E. HILL, MARGARET R. AND WILLIAM F. McCRIGHT, JOHN J. McQUEEN, RITA J. MOSKOWITZ, and BARBARA SANTEE,

Petitioners,

v.

THOMAS E. KEMP (Chairman, Oklahoma Tax Commission), JERRY JOHNSON (Vice Chairman, Oklahoma Tax Commission), CONNIE IRBY (Secretary-Member, Oklahoma Tax Commission), and BRAD HENRY (Governor),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ARGUMENT

Petitioners (or "Motorists") present several independent and compelling reasons for granting a writ of certiorari as to their claims, including that the Tenth Circuit's decision: *(a)* directly conflicts with at least one other circuit court; *(b)* is at odds with this Court's interpretation of the Tax Injunction Act; and *(c)* presents important questions of first impression requiring this Court's attention both *(i)* to ensure that all motorists—not just those residing in certain circuits—have direct access to a federal forum for resolution of important First and Fourteenth Amendment issues that are themselves the subject of a circuit split, and *(ii)* to prevent the Tax Injunction Act from becoming a means through which state-created viewpoint discriminatory private speech fora can be immunized from original federal jurisdiction.[1]

Respondents do not offer any serious rebuttal to Petitioners' explanation regarding the pressing need for this Court's review of the questions presented by the petition. For example, Respondents do not dispute the existence of a circuit split as to the application of the

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[1] These reasons have been repeatedly articulated by legal commentators. *See* Brianne J. Gorod, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 YALE L.J. 727, 733-34 (Dec. 2005); Howard J. Bashman, "Choose Life" Tags Appear Headed to Supreme Court, *available at* www.law.com (Mar. 27, 2006); Andy G. Olree, *Specialty License Plates: Look Who's Talking in the Sixth Circuit*, 68 ALA. LAW. 212, 215 (May 2007); Traci Daffer, *A License to Choose or a Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869, 889 (Spring 2007).

Tax Injunction Act to special license plate schemes, nor do they address the assertion that Petitioners' claims differ from those presented in *Hibbs v. Winn*, 542 U.S. 88 (2004), because Counts One through Four do not involve direct constitutional challenges to any aspect of the state's tax system. Respondents also do not disagree that additional litigation over the questions presented by the petition is likely to continue given the growing number of similar cases pending in the federal courts, the growing number of states selling (or refusing to sell) "choose life" special plates, and the very real risk posed by state-created private speech fora if the Tax Injunction Act continues to be applied as it was below.

Instead, Respondents seek to undermine the petition by depicting this case as a poor vehicle for resolving the significant questions presented. But that transparent and diversionary tactic is unavailing. Respondents' arguments that Petitioners lack standing and that venue does not lie in the district court below—arguments about which Respondents did not feel strongly enough to raise in the Tenth Circuit—lack merit and can be swiftly dismissed.

I. There Are No Impediments To This Court's Review.

A. Petitioners Continue To Have Standing To Assert Counts One Through Four.

Prior to enactment of Section 1135.7 by the Oklahoma legislature in 2005, the only special license plates permitted to be sold by the Oklahoma Tax Commission ("OTC") were those expressing a viewpoint that the legislature had codified. Section 1135.7 requires the OTC, as of January 1, 2006, to make "new" special plates available for use by motorists absent any codifying legislation, so long as the OTC has first received 500 pre-paid applications. 47 Okla. Stat. § 1135.7(B)(4) (Pet. App. E, 137a); *see also* Pet. App. A, 6a-7a.

Each of the 110 special plates (*i.e.*, those expressing a viewpoint specifically codified by the Oklahoma legislature) existing when Petitioners filed their complaint was grandfathered under Section 1135.7. 47 Okla. Stat. § 1135.7(G) (Pet. App. E, 139a); *see also* Pet. App. A, 10a-11a. Some of those plates had been authorized for immediate use, and remain available today, because more than 100 such plates had been purchased within a prescribed period after codification. 47 Okla. Stat. §§ 1135.3(A) & 1135.5(A) (Pet. App. E, 101a-103a & 115a-117a). Others had been authorized for immediate use, and remain available today, regardless of the number of each plate purchased following codification. Yet others had been authorized for use as soon as 100 paid applications had been received by the OTC (provided such payments were received within a prescribed time period after codification); those also remain available as such today. *Id.* Accordingly, each of

the "existing" 110 special plates was subject to far less stringent requirements than those applicable to "new" special plates under Section 1135.7.

The Oklahoma legislature remains able—despite enactment of Section 1135.7—to codify and authorize special plates for use once 100 paid applications for each plate are received by the OTC (provided such payments are received within a prescribed time period after codification). There is no hypothetical risk that the legislature will favor certain viewpoints in this manner—*it already has*. Specifically, the legislature codified in 2006—after enactment of Section 1135.7—at least five special plates displaying viewpoints that will be available for use by motorists as soon as 100 paid applications for each plate are received within the prescribed time period. The 100 paid applications requirement following codification is obviously less burdensome than the 500 pre-paid applications that are required in instances where, as here, the legislature elects not to codify a "new" plate displaying a certain viewpoint and instead forces motorists to utilize Section 1135.7. And because each of these five "new" plates has been codified by the legislature, Oklahoma's motor vehicle agencies can advertise their existence to accumulate quickly 100 paid applications. This stands in stark contrast to the five lone motorists who each would be forced under Section 1135.7 to marshal pre-paid applications from 499 other motorists for the identical expression on an identically-designed plate. *See* "Application for the 2007 Special License Plates," *available at* http://www.tax.ok.gov/mvforms/708-E-07.pdf.

Section 1135.7 is a smokescreen created by a legislative body intent on maintaining the challenged special license plate scheme as a mechanism for promoting the expression of certain viewpoints over others. It was for this reason that the Tenth Circuit squarely *rejected* Respondents' argument (made in their briefs and during oral argument) that Petitioners' claims had been mooted by Section 1135.7. Pet. App. A, 11a-12a (concluding that, despite "a significant step in allowing groups of all viewpoints to obtain specialty plates," there remains embedded in Oklahoma law "a difference arguably preferring one competing viewpoint over another"). Indeed, the challenged scheme on its face vests the Oklahoma legislature with unbridled discretion to make it more difficult for *all* disfavored viewpoints—not simply a pro-choice viewpoint—to be expressed in the speech forum involving special license plates.

This Court has long recognized the sufficiency for standing purposes of an injury caused by the state's creation of an un-level playing field in a private speech forum. *See, e.g., Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard.") (quotations omitted); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992) (government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). That is precisely the injury Petitioners allege here; the challenged special license plate scheme was facially unconstitutional when this lawsuit was commenced and remains so today, because it enables the expression of

all state-favored viewpoints by legislative edict, while it hinders *all* disfavored viewpoints through legislative inaction and administrative burden. Petitioners' injury is compounded by the fact that the state has created an un-level playing field in the arena of reproductive rights.

Moreover, this Court's decision in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-59 (1988), and its progeny reflect that Petitioners need not have attempted under Section 1135.7 to muster 500 pre-paid applications for their desired "pro-choice" special plate in order to satisfy the prudential standing requirement of injury. That is because *every* application of the challenged special license plate scheme is fraught with the potential for impermissible viewpoint discrimination. All that is required for Petitioners to satisfy the constitutional standing requirement of injury is evidence—as set forth in the First Amended Complaint—that they wish for, have sought, and were denied access to the forum in order to display a "pro-choice" view on the same terms as all other motorists (including those who share a contrary view of reproductive rights) are permitted.

Lastly, the remedy Petitioners seek—an injunction against the continued enforcement of the special license plate scheme creating this disparity, or, in the alternative, an injunction against the continued enforcement of the statutory provisions codifying the "choose life" special plate and the "adoption creates families" special plate—will plainly redress their continued injury. This Court has recognized, for example, that a plaintiff's injury manifesting itself in exclusion from statutory benefits

is redressable even if the desired remedy (*i.e.*, enjoining the statute) would result in denying the benefit to all potential recipients. *See, e.g., Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987); *Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Orr v. Orr*, 440 U.S. 268, 271-73 (1979). For this reason, federal courts presented with similar challenges to state special license plate schemes have repeatedly held that enjoining a statutory provision that authorizes issuance of a special plate expressing support for a "pro-life" viewpoint would remedy the plaintiff's injuries by leveling the playing field in the reproductive rights debate.[2] Federal courts also have held that redressability would be achieved in similar challenges where plaintiffs seek to enjoin all of

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[2] *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir.) (plaintiffs' injury could be redressed by enjoining South Carolina statute authorizing "choose life" special plate, even though remedy "would not grant [plaintiffs] access to the license plate forum"), *reh'g and reh'g en banc denied*, 373 F.3d 580 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005); *ACLU of Tenn. v. Bredesen*, No. 3:03-1046 (M.D. Tenn. Mar. 12, 2004) (unpublished decision) (plaintiffs "allegedly injured by having their opposing viewpoint drowned out through exclusion from the government forum" could have their injury redressed through enjoining Tennessee statute authorizing "choose life" special plate), *rev'd on other grounds*, 441 F.3d 370 (6th Cir.), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006); *Henderson v. Stalder*, 287 F.3d 374, 387 (5th Cir. 2002) (Davis, J., dissenting) (plaintiffs had standing when "injured by the government's promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing views," because injury could be redressed by striking Louisiana statute authorizing "choose life" special plate).

the statutory provisions constituting a state's special license plate scheme.[3]

B. Venue Properly Lies In The District Court Below.

Respondent Henry apparently agrees with Petitioners that venue is proper in the district court below and/or that consideration of venue issues has no place in the determination of whether to grant a petition for a writ of certiorari seeking further review of a threshold jurisdictional issue. In contrast, Respondents Kemp, Johnson and Irby argue that this Court should deny the petition based on the allegation that venue is improper in the district court below. Their argument fails for at least two reasons.

First, venue in a non-diversity civil action lies in any judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). "In the context of declaratory

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[3] *See Henderson v. Stalder*, 57 Fed. Appx. 213, 2003 U.S. App. LEXIS 930, at *1 (5th Cir. Jan. 9, 2003) (denial of rehearing en banc) (plaintiffs' injury would not be redressed by enjoining specific Louisiana statute authorizing "choose life" special plate; remanding to district court with instructions to dismiss unless plaintiffs amended complaint to seek injunctive relief against Louisiana's entire special license plate scheme); *Women's Emergency Network v. Bush*, 323 F.3d 937, 947 (11th Cir. 2003) (to remedy alleged injury where plaintiffs challenged specific Florida statute authorizing "choose life" special plate, court would be required to "instruct the State to close the specialty license plate forum altogether"—a remedy plaintiffs had not requested).

judgments or prospective injunctive relief regarding unconstitutional statutes, it has been held that [for purposes of Section 1391(b)(2)] suits challenging official acts may be brought in the district where the *effects of the challenged regulations are felt* even though the regulations were enacted elsewhere." *Bishop v. Okla. ex rel. Edmondson*, 447 F. Supp. 2d 1239, 1254 (N.D. Okla. 2006) (emphasis in original; quotations omitted); *see also Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001) (venue proper where harm is felt by plaintiffs).

Petitioners indisputably felt and continue to feel the effects of the challenged special license plate scheme in the Northern District of Oklahoma, where: Petitioners live and register their cars; Petitioners wish to express their desired viewpoint on special license plates; Petitioners attempted to purchase special license plates displaying their desired viewpoint; and other motorists can purchase special license plates displaying their desired (and, in some cases, opposing) viewpoints. It is therefore entirely irrelevant that venue *also* may be proper a mere 107 miles away in the Western District of Oklahoma where Respondents maintain their official offices.

Second, even if Respondents were correct that venue over Counts One through Four is proper only in the Western District of Oklahoma, any decision regarding the applicability of the Tax Injunction Act to those claims would be appealed to the Tenth Circuit—and it is the Tenth Circuit's decision on that precise issue on which Petitioners seek further review by this Court.

II. Respondents' Remaining Arguments Do Not Rebut The Compelling Reasons Presented For This Court's Review.

Respondents make a handful of cursory assertions—citing almost no support—intended to show that the Tenth Circuit's application of the Tax Injunction Act was correct. Each of these assertions purports to dispense in simplistic fashion with the complicated questions presented by the petition. Yet, it is precisely these questions that have split the circuit courts and led to misapplication of this Court's decision in *Hibbs*—and will likely continue to do so in the near future absent further instruction from this Court.

After acknowledging that—as the Sixth Circuit concluded in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 374 (6th Cir.), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006)—the purchase of a special license plate in fact resembles the purchase of a souvenir snow globe in a state park (or any other product sold by the state), Respondents assert that subsequent, recurring annual registration requirements render the amounts paid for the plates "taxes." This argument (raised for the first time) ignores the fact that the decision to continue expressing oneself via—and thus to register for—a special license plate remains a voluntary one. That annual payments are required to enter the forum each year has no bearing on their characterization as taxes versus contractual debts, fees, or something else altogether.

Respondents also urge that amounts voluntarily paid for special license plates are "taxes" simply because the state's intended uses of those amounts are for "purposes that are generally accepted as being funded through state taxes." Henry Opp. at 9. This reductive argument ignores the fact that not every dollar the government earns is a "tax." *See Bredesen*, 441 F.3d at 374 (voluntary payments are not taxes, "regardless of what the government does with the sales income").

Respondents' assertion that Petitioners seek an expansion of this Court's decision in *Hibbs v. Winn* misconstrues Petitioners' argument. Petitioners assert that the court of appeals (and the Fifth Circuit in *Henderson*) erroneously understood *Hibbs* to preclude a finding that the Tax Injunction Act permits federal courts to adjudicate constitutional claims that would exist even if the alleged "tax" were non-existent. Respondents make no effort to explain why *Hibbs* or the Tax Injunction Act should apply in such a circumstance. For this reason, Respondents' citation to *California v. Grace Brethren Church*, 457 U.S. 393, 417 (1982), is also misplaced; *Grace Brethren* involved claims by aggrieved taxpayers challenging the payment of their state unemployment taxes.

Respondents also seek to address the merits of Petitioners' First Amendment claims—an excursion irrelevant to the determination of whether Petitioners' claims are jurisdictionally barred by the Tax Injunction Act. Additionally, this argument mischaracterizes the nature of Petitioners' requested relief, which does *not* challenge Oklahoma's ability to fund adoption-related activities. Rather, Petitioners challenge the state's

restrictions on speech in a government-created public forum that operate to favor those viewpoints with which the state agrees. The availability of alternative means of expressing one's viewpoint—be it with a bumper sticker, painted car, or private banner plane—has no bearing on the underlying First Amendment analysis.

Finally, Respondents make a passing and inscrutable reference to *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 589 (1995). *Private Truck Council* held that Congress did not authorize state courts to award injunctive or declaratory relief under Section 1983 in cases directly challenging state taxes when there is otherwise an adequate remedy at law. *Id.* at 588. That holding has nothing to do with the question of whether Petitioners' claims are subject to the Tax Injunction Act in the first instance.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant a writ of certiorari.

Respectfully submitted,

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